

OPINIONS
OF THE
Corporation Counsel and
Assistants

FROM

April 16, 1926. to April 15, 1927.

VOLUME XV

Compiled and Edited by
SAMUEL A. ETTELSON
Corporation Counsel, City of Chicago

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P R E F A C E .

The following Opinions of the Corporation Counsel and his Assistants cover the period extending from April 16, 1926, to April 15, 1927. With the exception of the last opinions, these were all written and approved during the administration of Hon. William E. Dever, as Mayor of the City of Chicago. The last opinions were approved after Mr. Dever had retired from office, three of them having been approved by me while acting as temporary Corporation Counsel prior to my appointment for a second time as Corporation Counsel on April 18, 1927. Before relinquishing his office on April 12, 1927, the former Corporation Counsel, Hon. Francis X. Busch, prepared a statement in the nature of a preface to this volume, which is printed herein as his foreword concerning the opinions presented.

SAMUEL A. ETTELSON.

Statement of Corporation Counsel Francis X. Busch and His First Assistant Concerning the Opinions Printed Herein.

Following the usual practice of publishing each year a volume of opinions written by the Corporation Counsel and assistants, we present in this book such opinions written during the period extending from April 16, 1926, to the end of the administration of Hon. William E. Dever as Mayor as appear to be of sufficient value to preserve for future reference.

It has been found that these books containing opinions rendered in the Law Department of the City of Chicago, of which this is the fifteenth, with a general index covering the first thirteen volumes, have been of great service not only to the members of the City's Law Department but to the general practitioner as well.

The questions treated in many instances are of such a nature that it is difficult to find them discussed or digested in the law publications which are ordinarily referred to by lawyers. They relate to matters which spring up in the work of the various departments of the City government, and such questions frequently call for a solution that must be evolved from the practical situation that confronts the writer rather than reference books. Hence, the application of the law to these questions frequently is of absorbing interest, and whether or not it has been correctly applied is often not finally determined until long afterwards. While many such questions have been the subject of litigation and have been determined by the reviewing courts, the opinions rendered on them which appear in these volumes have seldom been reversed. We point to this record as an indication of how much thought and study is given to such opinions, all of which before they become official are considered by at least two members of the Law Department and sometimes by more than that number.

This volume, in all its essential details, follows the form and style of preceding ones, and is made up of the character of opinions which we consider helpful. It is not necessarily the length of an opinion or its reference to precedents that determines this, but rather its subject-matter and the method in which it is treated. We hope that this book, like the others will be of great assistance in disposing of questions that will arise in the future.

FRANCIS X. BUSCH,
Corporation Counsel.

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Chicago, April 11, 1927.

OPINIONS
OF THE
Corporation Counsel and
Assistants

FROM

APRIL 16, 1926, TO APRIL 15, 1927.

**Elimination of Position Appropriated for in the Annual
Appropriation Bill, in Case of Vacancy.**

April 16, 1926.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

You state in your letter of the 14th instant that your Committee has been requested to eliminate certain positions appearing in the Annual Appropriation Bill; that these positions are now vacant on account of death or resignation, and, in the judgment of the department heads, they are unnecessary. You ask for an opinion in respect to the elimination of such positions appropriated for under the General Corporate Fund, the Water Fund and the Vehicle Tax Fund, and as to the legal form of action necessary if such action is permissible.

If the positions in question are all in the classified service, and we assume they are, the law makes no distinction between them merely on account of the funds from which the salaries are drawn. It was held in the case of *People ex rel. Chadwick v. Sergel*, 269 Ill. 619, that the rule with respect to antecedent appropriations was the same in all cases. We believe that would hold true in regard to civil service positions as well.

There is no such thing as amending the Annual Appropriation Bill at this time for the purpose of eliminating positions, or for any other purpose. Section 2 of Article VII of the Cities and Villages Act permits that ordinance to be amended at the next regular meeting, and this implies that it cannot be amended at any other time.

In the case of *People ex rel. Roderick v. City of Chicago*, 283 Ill. 462, our Supreme Court held that the head of a department cannot refuse to make appointment to a civil service position which has been duly appropriated for if a vacancy occurs therein. This decision was rendered in 1918. Since that time we have undertaken to provide against the possibility of being compelled to fill positions that are not necessary after a vacancy occurs by placing in the Appropriation Bill each year a provision expressly stating that the head of a department shall not be required to fill a civil service position when a vacancy occurs, if, in his judgment and discretion, there is no necessity therefor. Hence, the head of the department need not appoint persons to fill vacancies in those positions that he desires to have eliminated.

While it is not within the power of the City Council to abolish the positions by amendment of the Appropriation Bill, it has the power, after July 1st, in case the money appropriated is not required for the position, to cause a transfer of the funds appropriated for the purpose to be made to some other purpose within the department, and in this way the appropriation can be used during the last half of the year if the position is not filled. While such procedure can never be used to deprive a civil service employee who is entitled to the position by law of his place and the salary therefor, it would be entirely proper in the case of funds which are not used because of the vacancy that exists.

Yours truly,

LEON HORNSTEIN,

First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Plumbers Acting as Meter Setters.

April 16, 1926.

MR. THOMAS J. TERRELL, and MR. JULIUS NEWMAN, Members
of the Board of Examiners of Plumbers.

Gentlemen :

We are in receipt of your letter of the 7th inst., in which you ask whether the City of Chicago has the right to employ men in its service doing plumbing work who are not licensed journeymen plumbers, and also asking for an interpretation of Sections 1 and 7 of the statute providing for the licensing of plumbers, and if the City is exempt from their provisions.

Two of the three questions which you ask could be answered categorically, if we were to take up the abstract propositions you place before us as they appear on their face; but we fear that such reply will only lead to further confusion, and therefore will endeavor to give an opinion governing the subject-matter you have presented.

This department prepared and forwarded to you, under date of February 25, 1926, an opinion to the effect that only licensed plumbers have the right under the provisions of the municipal code to connect and set water meters. This was in reply to a letter from you stating that there had been complaints regarding men other than plumbers setting water meters for the City of Chicago and asking for an interpretation of Sections 2945 and 4105 of The Chicago Municipal Code of 1922.

This question was understood to mean that you wanted to know by what authority private persons other than plumbers were connecting and setting water meters. It was not assumed that your question had anything to do with regular employees of the City doing such work, since the two sections you referred to clearly pertain only to persons other than City employees. It is obvious that no such person could connect a

meter with the city water works system without cutting a supply pipe or otherwise disturbing the water system or its connections.

It now appears that you understood this opinion to mean that a City employee cannot install a meter, after all preparations are made therefor, unless he is a plumber. We are informed that the practice of the Department of Public Works has been to employ a plumber to cut the pipe where a meter is to be installed, also to weld or otherwise attach a connection with a thread at each of the open ends of such pipe, so that it is prepared for the meter. Up to this point there is no question about the work being a plumber's work. When the pipe is in condition to receive the meter another employee is sent with the meter, who attaches it with a wrench and sets it for operation.

It was not the intention of this department, in the opinion we forwarded to you, to pass on the question of whether or not the making of such a connection by means of a wrench after the pipe is prepared on both sides is plumbing work or not. The determination of that question is not a matter of law, and we could only follow the opinion of experts on this point, just as a court would have to follow the opinion of experts if the matter got into court. There is nothing in the ordinances which determines the question. Pending the settlement of this question, however, we do not regard it as proper to disturb the status as it now exists, and we will certainly decline to say that civil service employes regularly assigned to this class of work should be dismissed or deprived of this work.

Consequently, while we are free to say that the City of Chicago has no more right to employ men to do plumbing work who are not plumbers than any other employer, we do not mean by this that the installation of meters after the pipes are prepared must necessarily be done by plumbers.

You state in your letter of inquiry that your Board has clearly and definitely defined the setting of water meters as plumbing work. While your determination on this point is

entitled to great weight as the opinion of experts on the point at issue, there is nothing in the law which makes it final.

With respect to the interpretation of Sections 1 and 7 of the statute providing for the licensing of plumbers, the first merely states that a person working as a master plumber or a journeyman plumber must procure a certificate, and the other provides a means of compelling the local authorities to put the machinery of the act in operation. The State Department of Registration and Education is given the power, under Section 7, to institute mandamus proceedings to compel the City's officers to create a board of examiners, to make rules and regulations regarding the water system, etc. Neither of these sections undertakes to define what is or is not plumbing work, and we can find nothing in the entire act which does this.

Yours truly,

LEON HORNSTEIN,

First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Legality of a Certain Original Entrance Examination for Position of General Asphalt Foreman.

April 17, 1926.

HON. CLAYTON F. SMITH, Deputy Commissioner of Public Works.

Dear Sir:

We have your recent communication with inclosure of letter to you from Thomas M. Boland, an asphalt foreman, in which he contends:

“that the examination held for the position of General Asphalt Foreman in 1918 should have been a promotional examination, and that therefore the certificate of Mr. J. T. Nebeck, on April 10, 1919, from the original examination list, was illegal.”

You ask to be advised “as to whether or not this contention is justified.”

If, at the time of said examination, the positions of asphalt foreman and general asphalt foreman were in the same general line of service and the position of general asphalt foreman was higher in grade or rank than that of asphalt foreman, as actually classified by the Civil Service Commission, and if it was possible at the time to fill the vacancy in the position of general asphalt foreman by a promotional examination, then the original examination, the list thereunder and the certification and appointment from said list are all illegal, and the contention here made must be sustained.

Two examinations are provided for by the Civil Service Act, viz.: that by Sec. 6, which provides that:

“All applicants for offices or places in said classified service, except those mentioned in Section 11, shall be subjected to examination, *which shall be public, competitive and free to all citizens of the United States*, with specified limitations as to residence, age, health, habits and moral character;”

and that by Sec. 9, which provides that:

“The commission shall, by its rules, provide for promotions in such classified service on the basis of ascertained merit and seniority in service and examination, *and shall provide in all cases where it is practicable that vacancies shall be filled by promotion. All examinations for promotion shall be competitive among such members of the next lower rank as desire to submit themselves to such examinations.*”

It is quite obvious from these express provisions of the Civil Service Act that one who has not yet entered the civil

service is eligible to take only an original entrance examination for the lowest grade or rank in the line of service which he seeks to enter; and that such one is not eligible and cannot legally be examined, certified and appointed to any position which involves promotion. Since "vacancies shall be filled by promotion" and those only are eligible to fill such vacancies who are "members of the next lower rank," it is a distinct violation of the letter of the law to fill a promotional position by an original examination and the appointment of one who is not yet in the civil service.

Facts pertaining to the case as they appear upon the records of the Civil Service Commission are as follows:

1915-1918

Asphalt Foreman—Class K, Grade II.

Foreman Asphalt Plant—Class K, Grade III.

General Foreman of Asphalt Repairs—Class K, Grade IV.

Last title changed in 1917 to General Asphalt Foreman.

Examination No. 3220 called for General Asphalt Foreman, Class K, Grade IV. *Original*, October 19, 1918.

Eligible list posted Nov. 1, 1918. John T. Nebeck certified from that list and appointed April 10, 1919, who has since held the position.

At the time of this examination there were two or more "asphalt foremen" eligible to take a promotional examination for the position of "general asphalt foreman."

It clearly appears from the Civil Service Commission's official classification that the positions of asphalt foreman and general asphalt foreman are in the same line of service and that the latter position is a promotional one, higher in grade and rank than that of asphalt foreman. Therefore a vacancy in the position of general asphalt foreman could lawfully be filled only by a promotional examination to which only those were eligible who were in the next lower rank of the service.

In an opinion to Hon. A. A. Sprague, Commissioner of Public Works, under date of December 9, 1924 (Opinions of

the Corporation Counsel, Francis X. Busch, 1924-1925, page 570, 578) we said:

“The test of eligibility to try for promotion in the civil service is thus plainly stated in Section 9 of the Civil Service Act as follows:

‘All examinations for promotion *shall* be competitive among such members of the next lower rank as desire to submit themselves to such examinations.’

The right here given to every member of the next lower rank (actually engaged therein as already defined) is given in language so plain and unequivocal as to permit of no possible construction that would in any degree limit or circumscribe that right. It is not within the power of the commission itself by rule, nor in the appointive power by delegation of authority from the commission, to deprive the civil service employe of this right. Any such rule or delegation of authority would be illegal and void under the civil service act. (*People ex rel. Kaster v. Kearney, Com.*, 164 N. Y. 14; 58 N. E. 64.”

We think the recent case of *People ex rel. Cederwall v. Finn et al.*, decided in the Appellate Court, First Division, on July 14, 1925, involves an analogous state of facts and may be taken as decisive of the question here submitted. The court in its decision says:

“This is a *mandamus* proceeding to restore the petitioner, Cederwall, to a position or place of employment in the Civil Service of the City of Chicago, and to require its Civil Service Commission to expunge its order cancelling its certification of petitioner for appointment to said position * * *

A demurrer was sustained to the first and second pleas. The first plea presents what we regard the vital question in the case, that the appointment of petitioner was void *ab initio* by reason of its having been made from an original entrance examination when there were persons in the employ of the City eligible and desirous of taking a promotional examination for the position in question.

The plea set up the provisions of Section 9 of the Civil Service Act relating to promotions and requiring the Commission to provide therefor in the classified

service, also the rule of the Commission relating thereto, which provides that promotional examinations shall be held when the next lower rank or grade contains two or more eligible persons desirous of taking the examination. The plea set up these facts: that petitioner was appointed as the result of an original entrance examination for such position; that no promotional examination therefor was held; that at the time of the original examination and of petitioner's appointment, the next lower rank or grade in the same line or character of work as said position did contain two or more eligible persons desirous of taking a promotional examination for said position; that the ward superintendents, then holding their positions as such in the classified service, were the next in rank or grade to said position and eligible and ready and willing to take a promotional examination for such position.

The grounds of the demurrer were (1), that the averments contained merely legal conclusions and were not supported by any averments of fact; (2), that whether a promotional examination should have been held cannot now be considered and is not decisive in determining the legality of the examination held; (3), that the action of the Civil Service Commission with regard thereto is *functus officio* and it cannot review or correct its errors; and (4), that there is nothing in the Civil Service Law to prohibit holding such an original examination, even though there are persons eligible to take promotional examinations.

We think the court erred in sustaining the demurrer on any one of these grounds. The plea sufficiently sets forth facts which support the legal conclusion that the appointment of petitioner was unauthorized and illegal. If so it sufficiently traverses plaintiff's claim to a legal appointment, and renders the second and fourth grounds of the demurrer untenable. The third ground has no bearing on that issue.

In *People v. Errant*, 229 Ill. 56, there was a petition of mandamus to compel the Civil Service Commission of Chicago to hold a promotional examination for the same position as here involved. The material facts of that case are much like those appearing from the pleadings in this record. Discussing the purposes and object of the Civil Service Act the court recognized the ultimate question to be decided was whether it was the duty of the Civil

Service Commissioners to hold a promotional examination for such position, limiting the examination to ward superintendents. A like rule of the Commission with regard to promotions was before the court as here set up in the plea, and its conclusion was that the ward superintendents being the next in order or grade to such position, it was the clear legal duty of the Commission to hold a promotional examination for such position, there being ward superintendents ready and willing to take the examination for the position to be filled, as is here alleged in said plea.

It being the legal duty to hold a promotional examination under the law and rule of the Commission in such a state of facts, it cannot be said that it was lawful to disregard that duty and hold an examination open to all citizens instead of one limited to those in the next lower grade or rank in the same line of employment, as the law requires. To hold otherwise would permit the Commission to evade a legal duty and defeat the purposes of the Civil Service Act in requiring a promotional examination."

The foregoing, we think, presents a complete legal answer to your communication and that of Mr. Boland enclosed therewith.

Very truly yours,

FRANCIS J. VURPILLAT,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Fixing Age of Employee for Purpose of Computing Annuity.

April 19, 1926.

RETIREMENT BOARD, MUNICIPAL EMPLOYEES' ANNUITY & BENEFIT FUND.

Gentlemen:-

Confirming verbal opinion heretofore given as to fixing the age of an employee for the purpose of computing annuity, the following is submitted:

Your letter of March 15 stated that William Akerhieln, a deceased employee of the City, gave his date of birth on his application to the Civil Service Commission in 1920 as April 10, 1864; that when he filed his information sheet on October 1, 1921, he again gave his date of birth as April 10, 1864; that his widow is filing an application for widow's annuity in which she states that her husband was born on April 10, 1854, and exhibits a marriage certificate, showing that they were both of age 25 at the time of marriage.

Section 61 of the Employees' Annuity and Benefit Fund Act provides as follows:

"In the case of any municipal employee who shall have filed an application for appointment to the service of such City, the age stated in such application shall be conclusive evidence of the age of such municipal employee for the purposes of this Act."

I am of the opinion that, under the law, the age given by William Akerhieln in his application for appointment to the service of the City must be taken as being his correct age for all purposes of the act.

Very truly yours,

GEORGE F. MULLIGAN,

Approved:

Assistant Corporation Counsel.

FRANCIS X. BUSCH,
Corporation Counsel.

Fraudulent Signatures on Frontage Consent Petitions.

April 19, 1926.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir :

This will acknowledge receipt of your letter of April 6th.

You advise us that you continually receive notices that fraudulent or unauthorized signatures have been used in order to procure permits for filling stations, notwithstanding the fact that the petitions contain the affidavit of the circulator thereof and are duly attested before a notary public. Some complaints come before the issuance of the permit and some arise after the permit has been issued.

You wish to be advised what should be the duty of your department where there is such fraud or unauthorized signatures.

Whatever impropriety there may be in signing without authority the names of property owners to a frontage consent petition, we doubt very much if it involves such an offense against the Criminal Code as would ordinarily render prosecution therefor successful.

Of course, where such unauthorized signatures come to your attention before the issuance of a permit, their object is frustrated, as the permit is not issued in reliance upon them. Where, however, permits have been issued upon fraudulent or unauthorized signatures, such permits can confer no rights upon the parties to whom they are issued.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Restriction of Hours for Excavating Operations.

April 19, 1926.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.

Dear Sir:

In reply to your inquiry of recent date, requesting an opinion "as to the legality of a restriction of excavation to the hours between 6:00 p. m. and 6:00 a. m., and also as to the legality of any restrictions whatever on the matter of excavation" (the subject of your inquiry being particularly directed to the territory within the loop district of the City), I respectfully submit the following:

By an act of the Legislature (Chap. 24, Par. 65, Clause 75, Illinois Revised Statutes), the City Council may declare and define nuisances, and in pursuance of the authority thus conferred, the City Council has enacted a general ordinance declaring and defining nuisances. By Section 2200 of The Chicago Municipal Code of 1922 the City Council provided that in addition to such things as are defined as nuisances those offenses which are known to the common law of the land and the statutes of Illinois as nuisances may also be proceeded against by the municipality.

There is no ordinance now in force which in any way limits the hours during which building operations may be carried on, except Section 829, which is limited to "any block in which more than half of the buildings on either side of the street are used exclusively for residence purposes," and the general ordinance declaring and defining nuisances does not include noise caused by excavation and building operations. Aside from noise resulting from explosions, there are few attendant upon any lawful pursuit that are of such a nature that city officials can suppress them without express enactment, and it is our opinion that it would be an unlawful exercise of discretion for a city official to suppress the lawful operation of a steam shovel, or the necessary building operations

in connection with the excavation for and construction of a building during certain hours of the day, and that an ordinance requiring such operations to be carried on at night only would be of extremely doubtful validity.

The question to be determined is whether the annoyance complained of is a public nuisance under the common law. Our Supreme Court in the case of *Earp v. Lee*, 71 Ill. 193; and the *City of Chicago v. Shaynin*, 258 Ill. 69, in defining a common nuisance, has adopted the view set forth by Hawkins in his *Pleas of the Crown*, Vol. 1, p. 336, which is as follows:

“A common nuisance is an offense against the public, by doing anything injurious to all the King’s subjects, or by omitting to do that which the common good requires. It follows that private annoyances are not the subject of public prosecution, but of a private action.”

In so far as the facts are explained in your letter and its accompanying communications, we are of the opinion that the noise created by the operation of a steam shovel during the usual business hours in the daytime does not fall within the scope of a public nuisance at common law and is not a statutory nuisance.

The City Council, under legislative authority to declare what shall be a nuisance and to abate the same, has found it expedient to enact ordinances regulating certain lawful pursuits, such as crying of wares, transportation of rails, playing of hand organs, building operations in residence districts at night, etc., and it is our opinion that it would be an improper assumption of authority for the City Council to pass an ordinance to suppress the operation of steam shovels used in connection with building operations during the usual business hours of the daytime.

Respectfully submitted,

ROY S. GASKILL,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

New Owner's Application for Garage License.

April 20, 1926.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

This will acknowledge receipt of your letter of April 9th, requesting the views of this department.

It has been customary, you state, for the City Collector to reissue a license for a public garage where the applicant now has a license, such matters not being referred to your department. If, however, the present licensee ceases to conduct the business, the person who desires to continue the garage business must make a new application in his own name. This application is then referred to the Building Department. In the latter case where a garage is being conducted in a building that complied with the ordinances when first occupied but is not in compliance with the ordinances as they exist to-day, you are compelled to return the application without your approval. Thus, the owner would be compelled to remodel the premises on change of tenancy, something he would not be required to do if the same tenant remained in possession or if the business was conducted under the name of the original licensee.

Ordinarily ordinances are not to be regarded as retro-active unless that intent is plainly to be gathered from the provisions of the ordinance.

Where a garage building was erected in compliance with the building ordinances of the City at the time of its erection, it is not our opinion that it should be made to comply with such ordinances as they exist to-day merely because of the fact that there may be a new licensee of the garage. If the only change is to be a change in the licensee, that of itself should not require that structural changes be made to make

the building comply with the present ordinances which would not be required in the case of no change in the licensee.

In reference to such applications for licenses as are now pending, we do not see any objection to your approving the same, provided the said garages were constructed in compliance with the terms of the ordinances at the time of their erection. In the endorsement of your approval, it might not be inadvisable to even state that fact thereon in connection with your approval.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Annuity Rights of Policeman Discharged from the
Service Who Takes His Refund and Is
Subsequently Reinstated.**

April 20, 1926.

RETIREMENT BOARD, POLICEMEN'S ANNUITY & BENEFIT FUND.

Gentlemen:

Replying to your letter of April 14, 1926, for an opinion as to the annuity rights of a policeman who is discharged from the Police Department and who applied for and was paid the refund of his annuity accumulations, and who was subsequently reinstated in the police service, the following is submitted:

Your letter states that Otto E. Manning, patrolman, was discharged from the Police Department July 10, 1925; that he applied for refund of his annuity accumulations, and payment thereof was made to him October 7, 1925; that on Janu-

ary 18, 1926, the Civil Service Commission notified him that he had been reinstated in the position of patrolman, and ordered him to report to Superintendent Collins for duty; that on January 21, 1926, an order was issued by Superintendent Collins reinstating the said Otto E. Manning.

I.

Section 39 of the Policemen's Annuity & Benefit Fund Act provides that any future entrant or present employee, without regard to the period of time he shall have served, who shall resign or be discharged from the service after January 1, 1922, and before he shall become 50 years of age, and any future entrant or present employee who shall have served less than 10 years who shall resign or be discharged from the service after January 1, 1922, and before he shall have become 57 years of age, shall have a right to have refunded to him the entire amount which shall have accumulated to his credit for age and service annuity and widow's annuity purposes on the date of such resignation or discharge from the service from amounts deducted from his salary, in accordance with the provisions of the act; that any such policeman who shall withdraw such amount so credited to him shall *ipso facto* surrender and forfeit all rights to any annuity or other benefit from the annuity and benefit fund provided for in the act, for himself and for any other person or persons who might benefit through him because of service rendered by him prior to the time he made application for refund of the said amount.

II.

Paragraph 3 of Section 39 provides that in the event such policeman subsequently re-enters the service before he shall attain the age of 57 years and becomes a beneficiary of the annuity and benefit fund provided for in the act, he shall retain the right to have his period of former service counted as service, for the purpose of computing the term of his service.

Sub-paragraph D of Paragraph 5 of Section 39 provides that, whenever any amounts shall be refunded, the amounts to the credit of the policeman concerned in every such transaction for annuity purposes, at the time any such refund shall be made, which shall have accumulated from contributions by the City, shall be transferred to the Prior Service Annuity Fund.

There does not appear to be any provision in the law under which a policeman withdrawing his accumulation upon his being discharged from the service can, after re-entering the service, repay such amount into the Annuity Payment Fund, and have the City's contributions transferred from the Prior Service Fund to the Annuity Payment Fund, and be re-established in the same status as though he had never withdrawn his accumulation.

III.

I am of the opinion that Mr. Manning is entitled solely to credit for the period of service rendered by him prior to his discharge, and cannot repay into the fund the accumulations heretofore refunded to and withdrawn by him.

Very truly yours,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Annuity Rights of Minor Child Born Prior to July 1,
1921, of Policeman Over 57 Years of Age.**

April 21, 1926.

RETIREMENT BOARD, POLICEMEN'S ANNUITY & BENEFIT FUND.

Gentlemen :

Replying to your request of April 17, 1926, for an opinion as to the rights of a minor child born prior to July 1, 1921, but whose father was over 57 years of age at the time of the birth of the said child, the following is submitted :

Your letter states that Michael Manning, Sergeant of District 10, resigned June 16, 1923, after having served in the Department of Police for more than forty years; that he was granted annuity; that he died June 30, 1925; that on July 22, 1925, the Board awarded an annuity of \$50.00 per month to his widow, Anna Manning; that Michael Manning, according to the records, was born April 17, 1853; that he married the present widow October 14, 1914; that two children were born of that marriage, to wit: Mary V. Manning on September 30, 1916, and Michael T. Manning on September 26, 1917; that at the time the first child was born Mr. Manning was 63 years of age; and at the birth of the second child Mr. Manning was 64 years of age.

I.

Section 44 of the Policemen's Annuity & Benefit Fund Act provides that a child's annuity shall be granted and paid for the benefit of any unmarried child less than 18 years of age, the issue of any policeman who shall die on or after the first day of January, 1922, provided such child shall have been born before such policeman attains the age of 57 years or before he shall have resigned or been discharged from the service.

I I .

There has heretofore been submitted to your Honorable Body an opinion in the case of William Gahan Kearney, being opinion No. 1266, to which reference is made, and in which opinion it was held that the Policemen's Annuity & Benefit Fund Act became a law on July 1, 1921; that the act contains no retroactive clause, and that consequently its terms were meant to apply to the future and not to the past. It was further held in said opinion that the Police Pension Act of 1917 provides a pension or an allowance for the benefit of children under 18 years of age of deceased policemen, without regard to the age of the father at the time of the birth of the child; that it was clearly not the intention of the Act of 1921 to take away entirely the grant of an allowance for a minor child as made in the Act of 1917, since the Act of 1921 provided for a similar grant of allowance but limited to the children born before the father attained age 57; that the Act of 1921 attempted to fix the age of 57 years as a sort of general deadline for policemen so far as concerned the fixing of annuities and benefits for future "entrance," the age limit of the father in the granting of the child's annuity and the age limit for the granting of duty disability benefits and ordinary disability benefits; and that this age limit, however, has reference to the future and not to the past, and should not be so construed as to deprive a policeman or his children of any rights or benefits granted to him or them under any prior pension act unless specifically so enacted. This interpretation is borne out by the fact that, so far as concerns the wife of a policeman married subsequent to his reaching age 57, the act specifically limits its provisions to such marriages occurring subsequent to the going into force and effect of the act.

I I I .

I am of the opinion that an unmarried minor child born prior to July 1, 1921, is entitled to be paid a child's annuity,

irrespective of the age of the father of such child at the time of the birth of such child.

Respectfully submitted,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Service Credit of Harry J. Peck.

April 21, 1926.

RETIREMENT BOARD, POLICEMEN'S ANNUITY & BENEFIT FUND.

Gentlemen:

Replying to your request for an opinion as to the service credit of Harry J. Peck, the following is submitted:

Your letter of March 20, 1926, states that Harry J. Peck, a former Chicago policeman, was discharged June 27, 1925; that he claims service credit for the period of time from 1903 to 1911, during which he was employed by the City of Chicago in the Department of Electricity; that from 1903 to 1914 he was an arc lamp trimmer; that beginning with the establishment of the Municipal Employees' Pension Fund in 1911 he began paying into the Municipal Employees' Fund; that in 1914 he joined the Police Department as a dog catcher; that Mr. Peck claims that the Amendatory Act passed June 29, 1921, amending the Police Pension Act of 1915 entitles him to credit for the time in question.

I.

There has heretofore been submitted an opinion in the matter of the service credit of Harry J. Peck, being opinion

No. 838, dated January 26, 1925, which opinion was based upon the facts as they were then presented, and which opinion held that Mr. Peck was entitled to service credit only from the date he became a member of the Police Department, to wit, July 10, 1914. In view of the additional facts presented by Mr. Peck, opinion No. 838 will be withdrawn.

I I .

Evidence taken in this matter and the records submitted show that Mr. Peck was a civil service employee from 1903 until the date of his discharge from the Police Department in 1925.

In 1911 there was created a Municipal Employees' Pension Fund for civil service employees in cities exceeding 100,000 inhabitants, which Legislative Act was approved May 31, 1911. This act provided that pensions should be payable under said act beginning five years after the date of the act to employees coming within its terms, and gave credit to all civil service employees of any city coming within the terms of the act for the periods of service rendered by such employee to such city as a civil service employee.

Under the terms of the Municipal Employees' Pension Fund Act of 1911, Mr. Peck was entitled to service credit for the entire period of his service beginning with the year 1903, so far as related to his pension rights in the said Municipal Employees' Pension Fund.

I I I .

On June 29, 1921, there was an amendment enacted to the Police Pension Act of 1915 defining the word "police-man" so as to include police dog catcher, in which capacity Harry J. Peck served during the period from July 10, 1914, to November 15, 1915. The amendment further provided as follows:

"Whenever any person holding any one of the positions above enumerated, in the service of any city cov-

ered by this Act, shall, prior to the passage hereof, have contributed toward the support and maintenance of any pension fund in said city, created by an Act or Acts of the General Assembly of the State of Illinois, such person, for the purpose of eligibility for pension under this Act shall be credited, by the Board of Trustees of the Police Pension Fund of said city, with the number of years during which such payments have been made; and the governing body and executive officers of the fund to which such person has contributed shall forthwith pay to the Police Pension Fund sums paid to it by said person, to be held and disbursed by said Police Pension Fund, in accordance with the provisions of this Act."

Mr. Peck claims that he is the only person to whom this above quoted provision of the act applies, and that the intention of the act was to give him credit for his entire period of service from 1903. The Act does not so provide, however, but specifically states that such person coming within the terms of the act "shall be credited * * * with the number of years during which such payments have been made," but "payments" were made only for a period of time beginning with the year 1911, as there was no municipal pension fund prior to that date, and it has not been shown that Mr. Peck contributed toward the support and maintenance of any pension fund of the City of Chicago other than the Municipal Employees' Pension Fund. Had the Amendatory Act in question provided that the person or persons within the provision of the act should be credited with the number of years during which they had served as civil service employees, or that such person or persons should be credited with the same period of service to which they were entitled under the terms of the Pension Act governing the pension fund to which they had been contributing prior to their being transferred to the Police Pension Fund, then Mr. Peck would have clearly been entitled to credit for the years from 1903 to 1911. However, the act does not so provide. The definition of the word "policeman" in the Amendatory Act of 1921 did not create a new class in the Police Department, but merely designated what members of the police force were intended

to be included within the term "policeman" (*People v. Foreman*, 296 Ill. 487), and provided for their service credits and the transfer of their contributions. Ordinarily, Mr. Peck would have been entitled to service credit only for the years he served in the Police Department so far as concerns his police annuity or police pension, but as the Amendatory Act of 1921 provides for a service credit for the number of years during which he contributed to the Municipal Employees' Pension Fund, Mr. Peck became entitled to a service credit from 1911.

I V .

I am of the opinion that Mr. Peck is entitled to be credited with the period of service from July 1, 1911, only, and that the Amendatory Act hereinbefore referred to is silent as to any credit for service prior to 1911. The transfer of Mr. Peck's contributions from the Municipal Employees' Pension Fund to the Police Pension Fund should be adjusted by your Honorable Body between Mr. Peck and the Municipal Employees' Pension Fund.

Opinion No. 838, dated January 6, 1925, and which limited Mr. Peck's service credit to a period starting July 10, 1914, is hereby withdrawn.

Respectfully submitted,

GEORGE F. MULLIGAN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Closing of Space Under Viaduct for Garage for City Owned Vehicles.

April 21, 1926.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir :

On January 25th last you wrote this office requesting an opinion concerning the feasibility of enclosing a space under the Roosevelt Road viaduct just east of State street for use as a garage for vehicles of your department, suggesting the desirability of such use in connection with the new station to be built near that point. On February 5th we wrote you to the effect that, if some method could be provided whereby the right of access to abutting and contiguous property might be amply protected, in our judgment the City might properly enclose the space.

Since writing our last letter we have gone over the grounds with Major Bauder and Captain Horan, and we are of the opinion that the space might legally be enclosed according to the plans of those gentlemen. The space in question fronts on State street and is adjoined on the north by a two story structure, and the lot on the south is unimproved. Crossing Roosevelt road at right angles about 100 feet east of the east line of State street is a private alley that affords access to buildings located on the east side of State street at that point. About 150 feet east of the east line of State street is a solid concrete abutment or retaining wall supporting the viaduct. This wall is the full width, or nearly so, of the street, and together with the other concrete viaduct supports, absolutely destroys the usefulness of the lower level as a thoroughfare. Since the construction of the viaduct the lower level has been abandoned for ordinary street use, for which it is no longer usable. The City may not, of course, obstruct or encumber any street or alley in any way that will impair the enjoyment of the common easement of passage and travel except in those cases where temporary obstructions are made necessary by street improvements or other emergencies.

The situation at this point, however, is considerably different. The grade of Roosevelt road has been elevated by the construction of the viaduct and the upper level is now the established thoroughfare. Under the plans suggested by Major Bauder and Captain Horan, the abutters' right of ingress and egress to the private alley mentioned will not be at all impaired, and on account of the viaduct supports, the space in question could not be used for ordinary street purposes no matter how desirable that might be. If the space in question were at all useful as a thoroughfare, we would unhesitatingly feel constrained to say that the City could not enclose it in the manner suggested, but inasmuch as this is not the fact we do not know of any grounds upon which such enclosure could be enjoined. No court would grant an injunction restraining the City from enclosing this space unless it appeared that by doing so the City was interfering with or destroying substantial rights. Inasmuch as we cannot conceivably see what rights or whose rights would be so destroyed, it is our judgment that no such order would issue. If the space were vacated the City would lose all right in it and for that reason vacation would be of no avail.

What we have herein stated we do not want to be understood as a precedent to be followed in all cases. The particular question raised is unusual, and each situation should be carefully studied before any conclusion is reached. Under the particular facts in this case, however, it is our opinion that the City may enclose the indicated portion of the lower level of Roosevelt road according to the plan suggested by Major Bauder and Captain Horan as approved by us. If there is to be any departure from such plan, we do not want to be understood as approving it until we have had an opportunity to examine it.

Yours very truly,

JAMES J. COUGHLIN,

Approved:

Assistant Corporation Counsel.

FRANCIS X. BUSCH,

Corporation Counsel.

Status of Special Assessment Bonds.

April 22, 1926.

HON. JOHN J. SLOAN, President Board of Local Improvements.

Dear Sir:

You have asked me to advise you, first, whether the issuance of special assessment bonds is restricted in that they must in the first instance be issued to the contractor who does the work or whether they may be sold upon the general market to any purchaser willing to buy; and, second, what measures may be legally adopted and enforced by the City of Chicago for the purpose of stabilizing special assessment bonds and vouchers and particularly for the purpose of providing for their payment promptly at the date of maturity.

These questions I shall proceed to discuss and answer in the order named. (1) Section 86 of the Local Improvement Act, which is the section of the statute authorizing the issuance of these bonds, contains no restriction whatsoever on the municipality in respect to the person or persons to whom they may be sold or delivered in the first instance, and consequently they may be given to the contractor in payment of the balance due on his contract or they may be sold to banks or to any person in this or any other city desiring to purchase the same. But under Section 87 of said act it is expressly prescribed that said bonds shall not be sold or disposed of at less than par together with the interest accrued from the date thereof to the date of issuance and delivery.

(2) The answer to your second question depends upon the provisions of the Local Improvement Act, the Unclaimed Rebate Act, the Revenue Act, etc., relating to the issuance and payment of special assessment bonds, the disposition of the unclaimed rebate fund, the time within which the County Collector shall apply for judgment and order of sale

for delinquent special assessments, etc. In order that you may understand the legal status of special assessment bonds, the manner in which the City is limited to the payment of the same out of certain specific funds, and the difficulty that is necessarily encountered in paying the same promptly at maturity, I have decided to set forth *verbatim* some of the pertinent provisions of the statute, notwithstanding in doing so this opinion will be extended to considerable length.

Section 4 of the Local Improvement Act provides that, "When any such city, town or village shall by ordinance provide for the making of any local improvement, it shall by the same ordinance prescribe whether the same shall be made by special assessment or by special taxation of contiguous property or general taxation, or both." And, as you know, it is customary in every ordinance passed by the Board of Local Improvements to prescribe that the improvement shall be paid for by special assessment or by special taxes.

Section 73 provides that "no person * * * taking any contracts from the City, * * * and agreeing to be paid out of special assessment or special taxation, shall have any claim or lien upon the City * * * except from the collection of special assessments or special taxes made or to be made for the work contracted for. * * * The City Treasurer shall keep a separate account with each special assessment warrant number and with the money received thereunder."

Section 86 provides that, "For the purpose of anticipating the collection of the second and succeeding installments provided for in this Act, it shall be lawful for such city, village or town to issue bonds, *payable out of said installment* * * * *Each bond shall state on its face out of which installment it is payable, and shall state, by number or other designation, the assessment to which such installment belongs.* * * * Provided nothing herein contained, shall be construed to prevent the payment of any voucher or bond out of an installment having a surplus to its credit, other than the one against which the same is issued. The intent

and meaning thereof being that in case from any cause the installment against which such bond or voucher is drawn has not sufficient money to the credit thereof to pay the same, the entire amount of the assessment or any installment thereof may be applied toward the payment of any such vouchers or bonds issued against the assessment. Each series shall become due at some time in the year in which the corresponding installment will mature, such date to conform, as near as may be, to the time when such installment will be actually collected, such time to be estimated and determined by the municipal officers issuing such bonds." *But such bonds shall become due "not later than the 31st day of December next succeeding the January in which the installment against which such series is issued shall become due and payable."*

Section 90 of the Local Improvement Act provides that "no person or persons accepting the vouchers or bonds as provided herein shall have any claim or lien upon the city, town or village in any event for the payment of such vouchers or bonds or the interest thereon, except from the collections of the assessment against which said vouchers or bonds are issued."

Section 93 of the Local Improvement Act provides that if after the payment of all vouchers or bonds, together with accrued interest, any surplus shall remain in the warrant, it shall be the duty of the proper officers of the City to at once cause a rebate to be declared and paid to the property owners except that if such surplus results from the five per centum levied on account of the cost of making and collecting the special assessment and letting and executing contracts, clerical hire, etc., then and in that event the moneys realized from the collection of said charge of five per cent "shall be used to pay the deficiency in interest in the warrant, and the balance shall be used to reimburse the corporate funds for any advances made from said funds on account of costs of the special assessment or special tax or any other expenses of the improvement for which such special assessment or special tax is levied."

Section 94 of the Local Improvement Act provides that wherever the interest collected upon the special assessment installments is insufficient to pay the interest accruing on vouchers and bonds issued to anticipate such installments then and in that event such deficiency in interest shall be first paid out of the five per cent fund referred to in Section 93, and that after the payment of such deficiency in interest the balance remaining in said five per cent fund shall then be transferred to the general corporate fund for reimbursement for moneys advanced to defray the cost of making special assessments.

Section 5 of the Unclaimed Rebate Act, which is Section 1010 of Cahill's 1925 Statutes, provides that any city having an "unclaimed rebate fund" (the City of Chicago has such a fund) may by ordinance direct the use of the money in such fund for the purpose of, among other things, paying unpaid special assessment vouchers or special assessment bonds and accrued interest, or deficiency in interest, or for the payment of public benefits.

Section 185 of the Revenue Act, which is Section 203 of Cahill's 1925 Revised Statutes, provides that in cities having a population of 100,000 or more application for judgment and order of sale for delinquent special assessments shall be made to the September term of the County Court.

It is important to remember that, while the application for judgment and order of sale is made to the County Court at the September term, the actual judgment is not entered until some time subsequent thereto. In fact, in the year 1925 the judgment and order of sale was entered in the latter part of October, but the County Collector did not actually begin the sale of property for delinquent special assessments until the 28th day of December, A. D. 1925, when of course it was a physical impossibility for him to make the sale of such property and return the moneys realized therefrom to the comptroller of the City in time to enable the comptroller to apply said money to the payment of bonds maturing not later than the 31st day of December of said year.

It will be seen from a review of the foregoing provisions of the statute that the City of Chicago cannot use general corporate funds not resulting from the collection of special assessments for the payment of these bonds and vouchers together with accrued interest. Not only is the statute itself specific on this point, but the Supreme Court has had occasion to construe the statute, and has held unequivocally that a city had no right to appropriate a stipulated amount out of miscellaneous receipts for the purpose of creating a special fund to be used for the purchase of special assessment bonds and vouchers. In this case, *City of Chicago v. Brede*, 218 Ill. 528, the Council passed an ordinance authorizing the creation of a special fund to be known as the "Improvement Bond Fund," to be used for the purchase of improvement bonds, coupons and vouchers issued during a certain period when the respective funds against which the bonds had been issued had been exhausted and deficiencies existed on account of delays in the collection of the special assessment. Brede, a taxpayer, filed a bill to enjoin the City from expending the amount appropriated for the purposes above referred to, and the Supreme Court, after carefully considering the question and analyzing the apposite sections of the Statute, held that "the City is powerless, by any ordinance which it might pass, to make itself liable in the face of the express provisions of the statute. While it might be of advantage to the City, and save money to the property owners and taxpayers, for the City to assume responsibility for the bonds thus issued, yet in the absence of legislative authority it is powerless to do so."

Hence it follows that the only moneys or funds that may be used for the payment of special assessment bonds or vouchers are :

- (a) The special assessments collected and against which the bonds and vouchers are issued ;
- (b) Interest on the undistributed special assessment funds, which I understand amounts to several hundred thousand dollars a year ;
- (c) The five per cent fund charged by the Board of Local Improvements, which may be used solely for the purpose of paying deficiency in interest ;

(d) The unclaimed rebate fund, which by ordinance may be appropriated to the payment of bond and vouchers.

If the amounts available in these four funds are not sufficient to meet the bonds issued during any current year at their date of maturity you are not legally permitted to attempt to remedy the situation by using other moneys in the corporate fund. Of course, one of the principal difficulties that the Comptroller's office steadily encounters is the delay in receiving remittances from the County Collector. In fact, I am informed that up until a few days ago the County Collector had not made his final returns for the year 1925. Of course, whenever the County Collector is in arrears beyond December 31, 1925, in turning over special assessments to the City of Chicago there is bound to be a deficit in certain warrants, and it will be impossible for the City to pay the bonds drawn against such warrants unless the interest on the undistributed special fund and the moneys in the unclaimed rebate fund are large enough to take care of this deficiency.

As I view it, no guarantee can ever be given that these bonds will be paid at maturity unless some means is devised of compelling the County Treasurer to make full and complete remittances to the City on or before December 31st of the year in which the special assessments are due and payable, or unless the statute is amended to permit either the application of moneys in the general corporate fund to the payment of special assessment bonds or to authorize such bonds to be issued with a maturity date in the year following, say July 1st, when it is certain that the County Collector will have made complete returns.

Respectfully submitted,

THOMAS A. SHEEHAN,
Attorney Board of Local Improvements.

Disposition of Proceeds of Wheel Tax.

April 22, 1926.

HON. ROBERT E. BARBEE, Alderman, 17th Ward.

Dear Sir:

We are in receipt of your letter of recent date in which you make inquiry concerning the expenditure of the proceeds of the vehicle tax. You ask as to whether this tax is to be spent according to wards and if 85 per cent of the tax collected in each ward is to be spent therein, and you ask also whether it is legal for such funds to be used for other purposes than for the repairing of streets.

Section 4071 of The Chicago Municipal Code of 1922 undertakes to make application of the revenues derived from this tax in the manner that you indicate. It provides that 15 per cent shall be set aside to be expended in the discretion of the Commissioner of Public Works for the repair of streets upon which there is an unusually heavy amount of traffic, and that the remaining 85 per cent shall be spent in the ward from which the revenues are obtained.

While this section of the code has never been directly amended or repealed, it has in effect been rendered nugatory by reason of provisions in the annual appropriation ordinances from year to year which are in conflict therewith. At the present time the distribution of that part of the fund which is set aside for pavement repairs is controlled by the paragraphs that appear under the heading "Pavement Repairs Section" on pages 2268 and 2269 of the Council Journal of January 16, 1926. The appropriation ordinance is an enactment of equal dignity with the ordinance included in the code and it conflicts with that ordinance. Under such circumstances the rule is that the later ordinance will prevail. Consequently, the provisions in the appropriation ordinance to which we refer you above lawfully controls the expenditures from the said fund.

With respect to the question of what the fund may be used for besides the repairing of streets, the statute says that the license fees collected under the wheel tax ordinance are "to be kept as a separate fund and used only for paying the cost and expenses of street or alley improvement or repair." (Cl. 96, Sec. 1, Art. V, Cities and Villages Act). The costs and expenses of street and alley improvement and repair of course includes all incidental expenses of administration, superintendence, etc. Hence, when you use the words in a broader sense, the cost and expense of street and alley improvement and repair includes the administration and equipment expenses that are appropriated for on pages 2267 to 2271 of the Council Journal above mentioned.

Yours very truly,

LEON HORNSTEIN,

First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

**Status of Public Alley Running North from Monroe
Street to Madison Street between State
Street and Wabash Avenue.**

April 23, 1926.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We have your communication of April 9th, requesting to know the status of the east half of the alley immediately west of South Wabash avenue extending north from East Monroe street about 76½ feet.

There has also been submitted to us by the representative of the Wabash-Monroe Building Corporation, as order No.

2,509,017, Book 7 (15-39-14), page 82, a survey by the Chicago Guarantee Survey Company, dated September 13, 1925, revised April 10th and April 17th, 1926, a plat of survey purporting to be of lot 9 (except the west 10 feet thereof taken for an alley) in block 2, fractional section 15, addition to Chicago.

This lot 9 is at the northwest corner of East Monroe street and South Wabash avenue, and extends westward approximately to the center of the alley immediately west. Lot No. 10 of the original subdivision lies immediately west of lot 9, and extends to South State street. Lot 8 lies immediately north of said lot 9, and lot 7 lies immediately west of lot 8. The Canal Commissioners' original subdivision laid out said lot 9 as 180 feet east and west and 76 feet north and south. The survey, as presented to us, makes this lot, including the alley, 180 feet, $10\frac{1}{2}$ inches on the side next to East Monroe street, and on the north side of the lot 180 feet, $9\frac{1}{8}$ inches. The South Wabash avenue side on this survey is 76 feet, $4\frac{3}{4}$ inches, and the western or alley side is 76 feet, $5\frac{1}{4}$ inches. The survey further indicates that the present building, the Windsor-Clifton Hotel, extends over and into the ten foot alley up to a north and south line, 8 feet, $4\frac{1}{2}$ inches east of the west lot line of said lot 9 as originally platted. The west end of the said Windsor-Clifton Hotel stands at the west end, or alley side, 3 inches north of the south lot line. At the immediate northwest corner of the intersection of East Monroe and South Wabash avenue said Windsor-Clifton Hotel building stands $1\frac{1}{2}$ inches east and $1\frac{1}{2}$ inches south into the streets over and beyond the respective lot lines. It would seem that the entire east front of the Windsor-Clifton Hotel building now stands $1\frac{1}{2}$ inches into the street.

On July 22, 1847, in Book H of Maps, Page 376, an alley was platted 20 feet wide consisting of the west 10 feet of lot 9 and the east 10 feet of lot 10. This map is without any certificate whatever. On April 25, 1855, one Elisha S. Wadsworth filed for record in Book 85 of Maps, Page 114, a declaration that said Wadsworth did on July 22, 1847, file for

record with the Recorder of Cook County a plat of a subdivision made by him of lots 7 and 10, in block 2 in fractional section 15, addition to Chicago; that he was at that time proprietor of said property and that said plat as recorded in said records in Book H, Page 376, is a true representation of said subdivision.

From this plat it is clear that the City has received by plat dedication the east ten feet of the original lots 7 and 10. Nowhere does it appear that any part of said portion of the alley was ever relinquished by the City. We have examined the purported abstract of title to said lot 9 and find no certificate or acknowledgment by the owner of lot 9 that said plat was authorized by such owner or owners.

The plat or map submitted with your request indicates a 19 foot alley as taken from your atlas.

It would seem from the further examination of the abstract that the above mentioned west 10 feet of said lot 9 were never formally dedicated as and for an alley by the owner of said lot 9. It would seem that the City, however, obtained a prescriptive right to the west 8 feet, 4½ inches of said lot 9, as and for an alley. The Windsor-Clifton Hotel was erected some fifty-four years ago, and we are therefore of the opinion that the new building may lawfully be erected to the westward up to a north and south line 8 feet, 4½ inches east of the west lot line of said lot 9. We are also of the opinion from the law as laid down in *Sears v. City of Chicago*, 247 Ill. 204, that the present owners are entitled to use the sub-alley space under these 8 feet 4½ inches above referred to without payment of compensation to the City. However, the use by the City of Chicago and the general public of said alley must not be interfered with.

We understand that the new structure is to cover the entire lot, excepting the westerly 8 feet, 4½ inches thereof. We would call attention, however, to the fact that the new building must not extend into South Wabash avenue the 1½ inches over the line that the present Windsor-Clifton Hotel extends over the line, as well as the 1½ inches that the south-

east corner of the present building extends into East Monroe street. The City of Chicago has a fee simple title in South Wabash avenue and East Monroe street. The southwest corner of the present Windsor-Clifton Hotel stands three inches north from the street line.

The City of Chicago has a prescriptive easement in such part of said lot 9 that has not been occupied by the now existing Windsor-Clifton Hotel building now lying and being south of the now standing Windsor-Clifton Hotel building and north of the north line of East Monroe street.

A line drawn from a point three inches north of the north line of East Monroe street at a point 170 feet, $10\frac{1}{2}$ inches west of the northwest corner of East Monroe street and South Wabash avenue running easterly to a point $1\frac{1}{2}$ inches south of the northeast corner of East Monroe street and South Wabash avenue will intersect the north line of East Monroe street at a point 56 feet and $11\frac{1}{2}$ inches west of the northwest corner of East Monroe street and South Wabash avenue.

Therefore, the new building must not be erected and no building permit should be granted for the occupation of and covering that part of said lot 9 described as:

Beginning at a point on the north line of East Monroe street 170 feet and $10\frac{1}{2}$ inches west of the northwest corner of East Monroe street and South Wabash avenue, thence running north three inches, thence running easterly to a point on the north line of East Monroe street 56 feet $11\frac{1}{2}$ inches west of the northwest corner of East Monroe street and South Wabash avenue, thence running westerly on the north line of East Monroe street to the point of beginning.

From an examination of the plats and records we find that the width of that portion of said alley lying and being north of the south lot line of original lots 5 and 6 is correctly shown on the plat submitted by you. From the said south lot line of original lots 5 and 6 to the north street line of East Monroe street the width of the alley is 20 feet, with the exception, however, of 1 foot and $7\frac{1}{2}$ inches of original lot 9 now

and since 1872 occupied by the Windsor-Clifton Hotel building as above set forth.

Your records, as shown by the plat submitted by you, therefore, should be corrected by moving the west line of said alley between the south lot line of original lot 6 and the north street line of East Monroe street westward a distance of one foot.

The dividing line between original lots 9 and 10, and the dividing line between original lots 7 and 8, should be considered the center line of the alley for the purposes of Section 20, Paragraph (b) of the Chicago Zoning Ordinance.

We are transmitting herewith a copy of said survey of said lot 9 by the Chicago Guarantee Survey Company, and also a photostatic copy of a survey made by said company of the entire block as order No. 2,506,054, Book 7 (15-39-14), Page 36, and dated July 1, 1925.

Very truly yours,

FRANK T. HUENING,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Procedure Under Deadly Weapon Act.

April 26, 1926.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

Your letter requesting proper procedure in booking prisoners under Section 6 of the Deadly Weapon Act, passed by the last General Assembly, said law now appearing on page 888 of Smith-Hurd Illinois Revised Statutes of 1925, has been referred to the writer for reply.

Section 6 of the Act provides as follows:

“Section 6. Whoever, after having been convicted of murder, robbery, burglary, or assault with intent to commit a felony, shall within five years thereafter violate the provisions of either Section 1 or 4 of this Act, shall be guilty of a felony and, upon conviction, shall be punished by imprisonment in the penitentiary for not less than one year nor more than ten years.”

In the event that your department has cause to arrest a man for carrying concealed weapons in violation of Section 1 or 4 of this act, and should it be determined that the prisoner had within five years previous to said arrest been convicted of murder, robbery, burglary or assault with intent to commit a felony, he should be charged with violation of Section 6, and the complaint should be as follows:

“That John Doe carried concealed on his person a certain revolver, contrary to Section 4 of An Act entitled “An Act revising the law relating to deadly weapons” (Filed July 3, 1925, L. 1925, p. 339); and that heretofore, to wit, on.....the said John Doe was duly convicted in the Criminal Court of Cook County of the crime of assault with intent to kill; and that by reason of said former conviction the said John Doe is charged with a felony as defined in Section 6 of the Act hereinbefore mentioned.”

Yours very truly,

JAMES I. McCARTHY,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Status of Athletic Commission of the City of Chicago.

April 27, 1926.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

In your letter of the 19th instant you state that you would like to be advised when the new boxing and wrestling bill will go into effect in the City of Chicago, and what effect it will have on the present ordinance governing and regulating professional athletics. You desire this information especially with reference to the registration fee for the athletes and the referees, and with reference to the collection of the 3 per cent of the gross receipts of wrestling matches and bicycle races.

We have written a letter of advice to the Superintendent of Police which specifies what the police are required to do and what parts of the act in relation to athletic exhibitions are now in effect in the City of Chicago.

For your information, we forward herewith a copy of that letter.

It contains little that is important on the points about which you ask, but it shows what parts of the law are now effective. In a general way it may be said that amateur boxing and wrestling matches, and boxing and wrestling matches given under the jurisdiction and control of educational institutions are now permissible and require no licenses or permits. Professional matches and exhibitions will be subject to the State license provisions as soon as the State Athletic Commission is organized and takes over the duties prescribed by the statute.

Under Section 8 of the statute, boxing, sparring and wrestling matches or exhibitions for prizes or purses, or where an admission fee is charged or received, are permitted, "sub-

ject to the direction, management and control of the State Athletic Commission, which is hereby vested with the sole jurisdiction over all boxing, sparring, and wrestling matches and exhibitions to be conducted in this State," excepting therefrom, however, amateur contests and schools, college and university contests. This provision of the statute clearly takes out of the hands of the City's Athletic Commission jurisdiction over wrestling matches.

In addition to taking the control of the wrestling matches from the City's commission, all revenue which the City has imposed on such matches, and all license and registration requirements with respect to referees and umpires, are taken away. Hence, while the Athletic Commission of the City is not wiped out by the new act, its activities will in the future have to be confined to such athletic contests as bicycle races, bowling matches and athletic contests other than boxing, sparring and wrestling. The provision for collecting 3 per cent of the gross receipts of bicycle races, bowling matches and other athletic exhibitions, except boxing, sparring or wrestling, remains in force.

Necessarily, such powers as the City's Athletic Commission has with respect to referees, umpires, rules, etc., over wrestling matches, fall along with the power to require licenses, fees and to control the exhibitions.

Yours truly,

LEON HORNSTEIN,

First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Payment of Refund to Estates of Deceased Persons.

April 27, 1926.

RETIREMENT BOARD, POLICEMEN'S ANNUITY & BENEFIT FUND.

Gentlemen :

Replying to your request of April 24 for an opinion as to the proper manner of distributing refunds under Paragraph (e) of Subdivision 5 of Section 39 of the Policemen's Annuity and Benefit Fund Act, the following is submitted :

Paragraph (e) of Subdivision 5 of Section 39 of the Policemen's Annuity and Benefit Fund Act provides that if there be no children of a policeman, the amount of the refund shall be paid to the heirs of such policeman, according to the law pertaining to the estates of deceased persons.

This provision can only mean that such refund shall be paid in accordance with the law governing the distribution of intestate estates since the payment of a refund to an executor would mean the distribution of the refund according to the terms of the will, which instrument might not provide for distribution of the state among the "heirs."

Chapter 39 of the Revised Statutes of Illinois, relating to "descent," as amended June 30, 1925, provides for the descent of real and personal property for those whose estates or any part thereof shall be deemed and taken as intestate estate after all just debts and claims against such estate are fully paid; but as Section 39 of the Pension Act contains no provision relative to the "payment of debts," but only for payment to the "heirs," the provision of Chapter 39 relative to the "payment of debts" does not apply in connection with the distribution of refunds.

So far as relates to the distribution of personal property to the heirs of a decedent, the law of descent as set out in Chapter 39 of the Statute provides that personal property shall be distributed as follows—

First: To his or her children and their descendants, in equal parts; the descendants of the deceased child or grand-

child taking the share of their deceased parents in equal parts among them.

Second: When there is no child of the intestate nor descendant of such child, and no widow or surviving husband, then to the parents, brothers and sisters of the deceased and their descendants in equal parts among them, allowing to each of the parents, if living, a child's part, or to the surviving of them, if one be dead, a double portion; and if there is no parent living, then to the brothers and sisters of the intestate and their descendants.

Third: When there is a widow or surviving husband, and no child or children or descendants of a child or children of the intestate, then the whole of the personal estate shall descend to such widow or such surviving husband.

Fourth: When there is a widow or a surviving husband and also a child or children or descendants of such child or children of the intestate, the widow or surviving husband shall receive one-third of the personal estate of the intestate, and the balance shall be distributed among the children and their descendants in equal parts.

Fifth: If there is no child of the intestate or descendant of such child, and no parent, brother or sister, or descendant of such parent, brother or sister and no widow or surviving husband, then such estate shall descend in equal parts to the next of kin to the intestate in equal degree (computing by the rules of the Civil Law), and there shall be no representation among collaterals, except with the descendants of brothers and sisters of the intestate; and in no case shall there be any distinction between the kindred of the whole and the half blood. I would suggest that should a case of this character arise, the matter be referred to the Corporation Counsel.

Respectfully submitted,

GEORGE F. MULLIGAN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Unpaid Portion of Annuity of a Deceased Policeman.

April 27, 1926.

RETIREMENT BOARD, POLICEMEN'S ANNUITY & BENEFIT FUND.

Gentlemen :

Replying to your request of April 24 for an opinion as to the disposition to be made of the unpaid portion of annuity due a deceased policeman, the following is submitted :

Your letter states that Lieutenant Bernard J. Burns of the 15th District was discharged January 30, 1926, after having rendered a service of 29 years, 11 months and 8 days; that he did not file application for annuity; that he died on April 2, 1926; that his widow has made application for annuity on behalf of herself and two children; that a son of Lieutenant Burns has made inquiry as to whether or not the widow or estate is entitled to payment of a policeman's annuity for the time elapsed between the officer's discharge and his death.

The right of Lieutenant Bernard J. Burns to annuity became vested in him upon his discharge, and could have been recovered by him from the date of his discharge, irrespective of when he made his application; in other words, the amount of annuity payable to him became his property immediately following his discharge and, upon his death, the amount of annuity which accumulated from the date of his discharge until the date of his death is payable to his executor or administrator, or to his estate. In the event of there being no executor or administrator appointed, it would be well, for the protection of the fund, to have the accumulated amount paid to the undertaker by direction of the widow and adult children, as the said accumulated amount is subject to claims against the estate, and the undertaker's bill is a preferred claim.

Respectfully submitted,

GEORGE F. MULLIGAN,

Approved :

Assistant Corporation Counsel.

FRANCIS X. BUSCH,

Corporation Counsel.

Special Fund for Proceeds of Sale of Park Property.

April 28, 1926.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We have before us the request for an opinion originating in the Bureau of Parks, Playgrounds and Bathing Beaches, in which it is asked whether it is possible to prepare an ordinance that will provide that whenever any corporate fund or bond fund property under the jurisdiction of said bureau is sold the proceeds be set aside in a special fund to be used only for the further acquisition of sites and the improvement of same for park and recreation purposes. You also say that if this is within the law an ordinance should be prepared for presentation to the City Council.

We assume that you refer to real estate only in seeking advice on this subject. Provision is made in the statute authorizing the sale of personal property no longer necessary or useful to the City for turning such personal property in as a part of the purchase price of similar articles. No such provision, however, applies in the case of real estate.

There is nothing which will prevent the placing of the moneys realized from such a sale in a special fund, but the difficulty will be to control its appropriation in subsequent years. That is to say, there is nothing in the law which prohibits the segregation of funds into as many accounts as the City Council or the Comptroller sees fit to divide them into, and these can be named or given special code designations without any check so far as the current year is concerned. But when the appropriations for the current year lapse, all moneys, by whatever designation the account may be distinguished, go into the general corporate fund unless there is some authority given under the statute for segregating the same for future purposes. Neither the officers nor the City Council can so con-

trol moneys that are received in one year as to prevent their use by appropriation in the following year. The exceptions to this rule are to be found in such cases as the traction fund, the water fund, the vehicle tax fund, etc., where the moneys raised are by law required to be retained for the specific purposes for which they are collected. In addition to such exceptions as these there are instances of funds being placed in the treasury where parties have some claim on them, as in cases where donations are made for a specific purpose, but all these are exceptions to the general rule, which is as stated.

Therefore, the most that we can do is to prepare an ordinance saying that when moneys are thus received they shall be placed in a special fund and retained therein until the passage of the next annual appropriation bill. We do not believe that this will serve the purpose that you have in view, and, unless we receive further word from you to that effect we will not prepare such an ordinance.

Yours truly,

LEON HORNSTEIN,

First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Power of Police in Suppressing Fortune Telling.

May 1, 1926.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

In reply to your inquiry addressed to the Corporation Counsel requesting an opinion as to the powers of the Department of Police in the matter of the suppression of fortune telling, card reading, etc., I submit the following:

In and by an act of the legislature of the State of Illinois, entitled "An Act to prohibit fortune telling and other practices whereby money is obtained on the pretense of the exercise of occult powers," in force July 1, 1917 (Chap. 38, Par. 273, Sec. 1 *et seq.*, Callaghan's Illinois Statutes Annotated), it is provided:

"Section 1. That whoever shall obtain money or property from another by holding himself out as skilled in fortune telling by means of card reading, palmistry, clairvoyancy, astrology, seership, spirit mediumship or any crafty science, or by any other devices or practices whereby money is obtained from the general public on the pretense of the exercise of occult or psychic powers, shall for each offense be fined not exceeding five hundred (\$500) Dollars. Provided, that the provisions of this Act shall not be construed to include, prohibit or interfere with the exercise of the spiritual functions or offices of any priest, minister or accredited representative of any religion, and provided further the provisions of this Act shall not be construed to include or refer to the practice of the belief known as Spiritualism or to any attempted communication with the spirit world by or through so-called mediums."

"Section 2. That whoever knowingly prints, publishes, distributes or circulates, or knowingly causes to be printed, published, circulated or advertised, in any newspaper, periodical, magazine or other publication or publications, or by display signs, circulars, hand-bills or any other means, any advertisement of any person's ability, skill or power in telling fortunes or revealing the future, or offering advice of any kind or nature by means of occult or psychic powers, faculties or forces, shall for each offense be fined not exceeding two hundred (\$200) dollars."

While there seem to be no Illinois decisions based upon the foregoing statute, the following decisions based upon similar statutes are of suggestive value.

The New Jersey Disorderly Act was held incapable of construction to include the penalizing of the acts of a certified medium of the Spiritualistic church in foretelling to those present at church service matters which would happen to

them in the future, although the accused was paid for such services, in view of the constitutional provision guaranteeing religious liberty. (*State v. DeLaney*, 122 Atl. 890.)

Under an Oklahoma statute similar in terms to this section, a regularly licensed medium of the Spiritualist church was convicted on proof of a specific instance of fortune telling for a reward. In affirming the judgment the court held that the enactment of such a statute was within the police power of the state, and that the constitutional guarantees of religious liberty do not protect violation of police regulations in the penal law. (*McMasters v. State*, 207 Pac. 566.)

Under the New York statute denouncing as disorderly "persons pretending to tell fortunes," a conviction was sustained as against the contention that the statute was invalid as a denial of religious liberty, the accused being a licensed minister of the Spiritualist church. (*People v. Ashley*, 184 App. Div. 520, 172, N. Y. S. 282.)

An ordinance of the City of Chicago in language substantially like that of Section 1 of the foregoing statute was held invalid as beyond the power of the City to enact under its delegated power to pass ordinances to suppress gaming and gambling houses and lotteries, and "all fraudulent devices and practices" for the purpose of obtaining money or property. (*City of Chicago v. Ross*, 257 Ill. 76.)

A Washington statute penalizing as a vagrant "Every person who asks or receives any compensation * * * for practicing fortune telling, palmistry or clairvoyance" was held valid and a conviction thereunder affirmed, although the defendant was an ordained minister in the "National Astrological Society," on the ground that the state, while prohibited to interfering with religious beliefs, had power to prohibit harmful practices based upon such beliefs. (*State v. Neitzel*, 69 Wash. 567, 125 Pac. 939.)

Under a statute denouncing as vagrants "persons who advertise and maintain themselves in whole or in part as clairvoyants," etc., proof that an accused person gave to a witness a business card describing the accused person as a spirit-

ualist and indicating that he would make appointments upon application, together with proof that witnesses visited the accused person at his rooms and that they paid him certain charges for the visit, was held insufficient to sustain a conviction under the statute. (*Stauffer v. State* [Tex. Cr. App.], 209 S. W. 748.)

In view of the language of our Supreme Court in the case of *City of Chicago v. Ross*, 257 Ill. 76, hereinbefore referred to, the validity of Sections 2629, 2630 and 2631 of The Chicago Municipal Code of 1922 is extremely doubtful. These sections purport to be legislation on the subject of fortune telling and are more stringent in their provisions than is the state statute on the same subject.

Referring again to Section 1 of the statute first above quoted, it will be noted that the following persons are excluded from the inhibitions of said act:

1. Any priest; 2. minister, or; 3. accredited representative of any religion.

The question as to who is a "priest, minister or accredited representative of any religion," is a mixed question of law and fact, primarily of fact.

In the report of Captain Thomas J. Pilkington which accompanies your communication, it is stated, "Mrs. Bowden states that this woman (Mrs. Peterson) is a member of the 'Spiritualist Church' at 19 W. Adams Street, and is a licensed medium. On the invitation of Mrs. Peterson, Mrs. Bowden visited the church at 19 Adams Street, and found that Mrs. Peterson is a full fledged spiritualist."

On the facts submitted we are of the opinion that Mrs. Peterson is exempt from the penalties of the statute above quoted.

Respectfully submitted,

ROY S. GASKILL,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,

Corporation Counsel.

Status of Alley Along Westerly Side of Fargo Avenue.

May 3, 1926.

HON. ALLEN B. POND, Chairman, Board of Appeals.

Dear Sir:

We have your communication of April 8, 1926, requesting our opinion as to whether the alley along the westerly side of the premises known as 1337 Fargo avenue, claimed to be a private alley, is an alley in the meaning of the word contained in Section 18, Paragraph (d) of the Chicago Zoning Ordinance.

Said paragraph of the ordinance is as follows:

"(d) For each 1 foot that a building or portion of it is distant from the center line of any alley, such building or such portion thereof may be erected 7 feet in height and no building or portion thereof shall be erected nearer to the center line of an alley than 8 feet, provided these regulations shall not be applied along that part of an alley for the 55 feet of its length nearest the established building line on the street which the alley intersects."

We have examined the maps and plats in our Map Department concerning the subdivision in question, and find that on August 27, 1890, there was recorded as document No. 1326212 in Book 42 of Plats, Page 39, a subdivision known as "Birchwood Beach" described by metes and bounds, in Section 29-41-14 north. This subdivision with streets and alleys was dedicated by a statutory plat.

The alley, however, on the east side of Sheridan road, has been reserved and so noted on said plat of subdivision as and for a private alley belonging to the next abutting property owners. The fee in this alley, therefore, remains and belongs to the next abutting property owners, subject to a private easement. This private alley in this subdivision begins, at its northerly end, at Rogers avenue, or the old Indian boundary line, and extends southerly to Kenilworth avenue.

The alley above described is the alley in question and referred to in your request for an opinion.

This alley in Block 15 of this subdivision, the second block south of the premises in question, has been entirely closed up and appropriated to private use by the next abutting or adjoining property owners.

It is the right of the owners of the premises in the block south of Fargo avenue, also, to close up entirely the alley in question, if they so desire to do.

The mere permissive use by the public of a private alley does not make such alley a public alley, as is said by our Supreme Court in *City of Princeton v. Gustafson*, 241 Ill. 567, quoting from page 570:

“In order to establish a street by prescription the use and enjoyment of the land claimed as a street must have been adverse under a claim of right, exclusive, continuous, uninterrupted, and with the knowledge and acquiescence of the owner of the land. (*City of Chicago v. Chicago, Rock Island and Pacific Railway Co.*, *supra*.) In this case the strip was originally set apart by the owners thereof as a private way, and the use thereof will be presumed to have been in accordance with the original intent of the parties. In *Illinois Ins. Co. v. Littlefield*, *supra*, it was said (p. 373): ‘The use will be presumed to have been in accordance with the intention of the owner, and when the way is opened as a private pass-way, and that fact clearly appears, it cannot be converted into a public highway by the mere use thereof, no matter how long that use may be continued.’ ”

We are, therefore, of the opinion that the strip of ground in question designated as a private alley in said block in question, is not to be considered an alley in the meaning of the word contained in Section 18, Paragraph (d) of the Chicago Zoning Ordinance.

Yours truly,

FRANK T. HUENING,

Approved:

Assistant Corporation Counsel.

FRANCIS X. BUSCH,

Corporation Counsel.

Appropriation for Dairy Inspection.

May 3, 1926.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.

Dear Sir:

You have made inquiry concerning the proper interpretation to be placed on the item in the appropriation bill of the current year designated as "60-S-1, Board, lodging, railroad fare (dairy inspection)\$20,672.00."

The particular question you ask is whether this can be used for garage rent for personally-owned cars of dairy inspectors while in the field.

It appears from an examination of the appropriations for upkeep of personally-owned automobiles that the allowance is \$60 per month in almost every instance. In fact, in the joint appropriation for such personally-owned automobiles of food inspectors and dredging inspectors in charge there is a distinction made between the dredging inspector in charge, who only gets \$60 a month for such upkeep, and the food inspectors assigned to dairy inspection, who are given \$75 per month. The reason for the distinction seems to be made plain in the appropriation itself, which inserts the words "when assigned to dairy inspection" after the words "food inspectors." The City Physician gets only \$60 per month for that purpose, and there appear to be others in the Department of Health whose allowance is the same. Hence, it is quite clear that the dairy inspectors are allowed extra compensation over and above what is allowed to other City employes for reasons that do not at once appear from the reading of the appropriation bill. There is some ground for the assumption that the use of these automobiles on country roads results in larger bills for repairs and depreciation of the value of the cars, and that the allowance is intended to meet this item. You say in your letter that the hard

usage on country roads in all kinds of weather makes it difficult for dairy inspectors to maintain and replace their cars on a \$75 rate.

But while there is room for the claim that where a dairy inspector is compelled to remain out on the road over night his garage fee should be paid, neither the wording of the two appropriations in question nor the intention of the council, as gathered from inquiries which we made, authorize such allowance. If the appropriation on which it is proposed to draw were merely "for expenses" we would not hesitate to say that such an interpretation as you mention would be proper, but in the face of a specific itemization into "board, lodging, railroad fare," we are unable to assent to such view.

Yours truly,

LEON HORNSTEIN,

Approved: *First Assistant Corporation Counsel.*

FRANCIS X. BUSCH,

Corporation Counsel.

Necessity of Rear View Mirrors on City Motor Trucks.

May 3, 1926.

MR. JOHN P. ALLEN, Superintendent Water Pipe Extension.

Dear Sir:

In reply to your communication addressed to the Corporation Counsel requesting an opinion as to the necessity of rear view mirrors on city motor trucks, I submit the following:

In and by an act of the legislature of the State of Illinois, entitled, "An Act in relation to motor vehicles and to repeal a certain Act therein named," Approved June 30, 1919, in force January 1, 1920, and amendments thereto (Chapter 95a, Illinois Revised Statutes), it is provided:

“Section 2. * * * For the purposes of this Act, motor vehicles as a class shall be divided into two divisions, viz:

First: Those vehicles which are designed and used for the carrying of not more than seven persons.

Second: Those vehicles which are designed and used for pulling or carrying freight and also those vehicles or motor cars which are designed and used for the carrying of more than seven persons.”

In and by Section 21a of said act (added by Laws of 1923, p. 552, in force July 1, 1923) it is provided:

“No vehicle of the second division as described in section 2 of this Act shall be operated on any public highway unless it be equipped with a mirror so attached that it will afford the driver a view of the road behind him.”

No exemptions from the foregoing provisions of the statute are provided for by said act.

I am therefore of the opinion that rear view mirrors are required on all trucks as above defined.

Respectfully submitted,

ROY S. GASKILL,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Water Closet Facilities in Stores and Factories.

May 5, 1926.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.

Dear Sir:

In your recent communication addressed to the Corporation Counsel you state:

“There has been some uncertainty in regard to the exact meaning of the state law and various ordinances

of the city requiring water closet facilities to be provided in places of employment and mercantile establishments. Furthermore, there has been considerable difficulty in enforcing what appears to be the law as it applies to small stores and establishments.

"I should, therefore, be pleased to have you inform me what are the definite requirements in regard to providing of water closet facilities in factories, workshops, mercantile establishments, and the general class of small stores."

In regard to factories, mercantile establishments, mills or workshops, Chapter 48, Illinois Revised Statutes, provides:

"Section 20. Every factory, mercantile establishment, mill or workshop shall be provided with a sufficient number of water closets * * * within reasonable access of the persons employed therein, and such water closets * * * shall be supplied in the proportion of at least one (1) to every thirty (30) male persons and one (1) to every twenty-five (25) female persons; and whenever both male and female persons are employed, said water closets * * * shall be provided separate and apart for the use of each sex, and plainly marked by which sex they are to be used; and no person or persons shall be allowed to use the closets * * * assigned to the opposite sex; and such water closets * * * shall be constructed in an approved manner and properly enclosed, and at all times kept in a clean and sanitary condition. The closets or privies, where practicable, shall be located so that they shall have direct ventilation with the outside air; * * * *Provided*, that nothing in this section shall be construed to prevent any city, * * * by appropriate ordinance or regulation, from prohibiting the construction, use or maintenance in such city * * * of any kind of earth closets, or privies, which may be considered a nuisance or detrimental to the public health."

Section 21 of said act, provides for washing facilities and dressing rooms, and further provides:

"* * * that nothing in this Act shall be construed as abrogating or repealing any provision of section five (5) of an Act entitled, 'An Act to provide for the licensing of plumbers, and to supervise and inspect plumbing,' approved June 10, 1897, and in force July 1,

1897, or the provisions of any local ordinance or regulation of any city, * * * requiring approved and sufficient methods of sanitation, light, heat, drainage or ventilation of an equal or superior standard to that required of this Act.”

TERMS DEFINED.) “Section 29. The following terms used in this Act shall have the following meaning: The term ‘factory’ means any premises wherein electricity, steam, water or other mechanical power is used to move or work any machinery employed in preparing, manufacturing or finishing, or any process incident to the manufacturing of any article or part of any article; or the altering, repairing, ornamenting or the adapting for sale of any article. The term ‘mill or workshop’ shall include any premises, room or apartment not being a factory as above defined, wherein any labor is exercised by way of trade or for the purpose of gain in or incidental to any process of making, altering, preparing, cleaning, repairing, ornamenting, finishing or adopting (adapting) for sale any article or part of any article, and to which or over which building, premises, room or apartment, the employer of the person employed or working therein has the right of access or control: *Provided, however,* that a private house or private room in which manual or other labor is performed by a family dwelling therein, or by any of them for the exclusive use of the members of such family is not a factory, mill or workshop within this definition. The term ‘mercantile establishment’ shall include all concerns or places where goods, wares or merchandise are purchased or sold, either at wholesale or retail.”

The statute contains no exceptions or exemptions from the provisions of Section 20 above quoted, and said section applies to all factories, mercantile establishments, mills or workshops, as defined in Section 29.

A room in a manual training school where machines and tools are used and operated is a “workshop” within the meaning of the foregoing statute. (*Board of Education v. Industrial Commission*, 301 Ill. 611.)

Article IX of Chapter LX of The Chicago Municipal Code of 1922 provides as follows:

“3037. In all places of employment where men and women are employed, separate and sufficient water-closets shall be provided for males and females. Water-closets for men shall be plainly marked ‘Men’s Toilet’ and water-closets for women shall be plainly marked ‘Women’s Toilet.’

“In all places of employment, one water-closet shall be provided for every twenty-five males or less number, and one water-closet shall be provided for every twenty females or less number. Such water-closet facilities shall be furnished upon at least every second floor. Where there are employes in any basement, such basement shall be considered one floor.”

It will be noted that the foregoing section of the ordinance is more stringent in its requirements than is Section 20 of the statute first above quoted.

The question of the sufficiency of the number of water-closets provided and of their sanitary features are questions of fact to be determined by the Commissioner of Health under the powers delegated to him under the general health ordinances of the City.

As to water-closets in hotels and lodging houses, Section 3038 of the Code of 1922 provides:

“In lodging houses and hotels hereafter erected or altered there shall be provided one water-closet for every twenty-five males or less number and one water-closet for every twenty females or less number. The number of water-closets required shall be determined from the number of lodging quarters provided. There shall be at least one closet on each floor. The general water-closet accommodations of a lodging house shall not be placed in the basement.”

Again, concerning buildings used for both business and residence purposes, Section 3038 of the Code of 1922 provides:

“In all buildings used jointly for residence and business purposes, separate and sufficient water-closets shall be provided for the use of families and for the use of employes and patrons of the place.”

Thus, the question of sufficiency is left to the discretion of the Commissioner of Health.

In and by an act of the legislature entitled, "An Act for the regulation and inspection of tenement and lodging houses, or other places of habitation," approved and in force May 30, 1881, (Chapter 24, Paragraphs 668 to 673, Illinois Revised Statutes), it is provided in Paragraph 668 that architects and builders shall submit plans and specifications of any proposed building to the health commissioner "for his approval or rejection, as to the proposed plans for ventilation of rooms, light and air shafts, windows, ventilation of water closets, draining and plumbing."

Section 2, Paragraph 669, of said act provides for the issuance of a certificate of instruction from the health commissioner prior to the installation of any plumbing work, and Section 3, Paragraph 670, provides for the approval of such plumbing work by the health commissioner.

Section 304 of the Code of 1922, as amended July 15, 1924, provides that every bakery "shall be provided with adequate plumbing and drainage facilities, including well ventilated water closets and impermeable sinks on iron supports."

In relation to drug stores, Section 1105 of the Code of 1922, as amended April 30, 1924, provides "* * * It shall be unlawful for any person * * * to maintain, operate or conduct any drug store in an insanitary condition. For the purpose of this ordinance insanitary conditions shall be deemed to exist * * * if adequate toilet facilities, soap and clean towels are not provided for such employees."

Section 2158 of the Code of 1922, relating to stores, factories and workshops, provides in part: "Sufficient and separate water closets shall be provided for male and female employees, and such water closets shall be properly ventilated."

In relation to manufacturing confectioners, Section 2002 of the Code of 1922 provides in part: "Adequate and convenient washing and toilet facilities shall be provided for employees in such establishments, and the location of same with reference to their proximity to the places where the

manufacturing processes are carried on shall be subject to the approval of the commissioner of health."

In relation to wholesale food establishments, Section 2009 of the Code of 1922 provides in part:

"It shall be the duty of every person * * * conducting, operating or maintaining a wholesale food establishment to keep the floors, walls, pillars, partitions, ceilings, receptacles, refrigerators, implements and machinery of every such establishment * * * in a clean and sanitary condition. For the purposes of the enforcement of this article, unclean and insanitary conditions shall be deemed to exist * * * if no adequate toilet facilities, soap or clean towels are provided for employes handling foods."

Section 2016 provides like requirements in relation to retail food establishments, and Section 2470 relating to wearing apparel shops has the same provision; likewise Section 2477 relating to factories and workshops; Section 2484 relating to chemical or paint factories; Section 2527 relating to mercantile establishments; Section 3429 relating to refreshment dealers. There are also various sections of the ordinances which provide for inspections to be made by and at such times as may be determined by the Commissioner of Health.

Section 2386 of the Code of 1922 relating to laundries provides:

"Every laundry shall be provided with separate water closet facilities for male and female employes, and every room or compartment in which any water closet is installed shall be provided with adequate natural ventilation by means of windows or skylights opening to the external air."

Section 2387 provides in part:

"Every laundry shall be provided with sufficient and suitable lavatory facilities, including approved wash bowls, * * * and such other equipment as the commissioner of health may deem necessary for the health and comfort of the persons employed therein."

In reply to your inquiry, "Is it required that separate toilets for men and women be provided in places of employment or mercantile establishments where only a limited number of persons are employed?" I would say that the statute (Sec. 20, Chap. 48) first above quoted, makes no exceptions in the matter of factories, mercantile establishments, mills or workshops. If the statute is too strict in its provisions, that is a matter for the consideration of the legislature.

There appears to be no specific provision as to separate toilets for men and women in the case of stores and workshops where the business is conducted principally by the male members of the owner's family, and only one or two persons are employed, such employed persons being all of the same sex. We have quoted briefly from all ordinances that have come to our notice covering the question of toilet facilities in the various branches of industry hereinbefore enumerated. Questions arising that do not come within the provisions of the foregoing are matters to be determined by the Commissioner of Health in the exercise of a sound discretion under the general powers conferred upon him by ordinance.

In determining whether the toilet facilities are "adequate" for a store at any given location, the question of whether a toilet in an adjoining store or building, to which access may only be had from the street, is adequate, is a question of fact to be determined by the Commissioner of Health in view of the facts in each particular case. "Adequate" as used in connection with the subject of our inquiry is synonymous with "sufficient," and in the last analysis involves a question of fact.

Respectfully submitted,

ROY S. GASKILL,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Endurance Contest for Automobile in Showroom.

May 5, 1926.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir :

Your communication addressed to the Corporation Counsel requesting an opinion as to the propriety or legality of granting permission to the Community Motors, Inc., to conduct an endurance contest with a certain make of automobile in various automobile showrooms in the City of Chicago, has been referred to the undersigned for consideration and reply.

In a letter from the Community Motors, Inc., addressed to your secretary, it is stated :

“We intend to take a new Pontiac car and run it at our various showrooms for a period of thirty days. A man will be in attendance at all times, the exhaust will be carried out from the front of the building in order not to be a nuisance to any one.”

There appears to be no ordinance covering the precise question involved, other than Article VIII of Chapter LXXVII (Streets) of The Chicago Municipal Code of 1922, relating to temporary zones of quiet, and Article IX of said chapter, relating to zones of quiet surrounding schools.

If the proposed endurance contest is not to result in the creation of loud or unusual noises, we see no objection to the granting of permission therefor.

Respectfully submitted,

ROY S. GASKILL,

Assistant Corporation Counsel.

Approved :

FRANCIS X. BUSCH,

Corporation Counsel.

**Wages of Civil Service Employees Laid Off for
Purposes of Economy.**

May 5, 1926.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

You forwarded to this department the claim presented on behalf of various employees of the Department of Weights and Measures for salary during the period from August 21 to September 21, 1925, with a request for an opinion as to the liability of the City thereon. We assume that the question arises because the employees who make the claim are in the classified service and they probably believe that the City Civil Service Law prohibits their being laid off.

Accompanying the claim is a file of correspondence, containing, among other things, a letter from the Inspector of Weights and Measures in which he explains that the employees in question were laid off, each for a short time only, during the period mentioned, and that this was done in compliance with instructions to the department to effect a saving in expenditures of \$3,500 during the last six months of 1925. It is further explained that this saving could not be effected except by laying off help.

There is nothing before us which indicates that this suspension of employees was made for any other reason than for purposes of economy deemed necessary by those officers who were charged with the responsibility of administering the finances of the City. Apparently it was done in good faith, and to meet a situation where a lack of funds required it. None of the employees who make such claim were laid off for more than 30 days—in fact, it appears from the list that one of them was laid off only 4 days and all the rest were laid off for only one-half month. They rendered no services to the City during the period they were off the pay-roll.

Under these circumstances none of these employees has a valid claim against the City. The question presented has been passed on by our Supreme Court. It was held, in the case of *Thomas v. City of Chicago*, 273 Ill. 479, that under Section 12 of the City Civil Service Act the head of a department has power, acting in good faith, to lay off his subordinates for a period not exceeding thirty days on account of lack of work, lack of funds or other good cause. It was also held that this power is not restricted to the seniority method which prevails where there is occasion to drop an employee on account of the lack of an appropriation or other reason requiring either a permanent discontinuance of the place or its suspension until some time when the City Council again makes provision for it. The doctrine announced in the *Thomas* case has not since been modified in any way, and it applies in the case before you.

Yours truly,

LEON HORNSTEIN,

First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Proposed Ordinance Concerning Signboards and Billboards.

May 5, 1926.

JAMES E. TODD, Esq., Secretary, Commission on Revenue.

Dear Sir:

We are in receipt of your letter in which you state that the Commission on Revenue directed you to request from this department draft of an ordinance amending the building code regarding the issuance of permits for signs. You state in

your letter that the Commission also wishes to be advised whether it would be proper to pass an ordinance along the lines suggested therein.

The proposed ordinance as outlined by you would declare all signboards and billboards nuisances, but would permit their construction and maintenance for not to exceed one year upon issuance of a permit which can be renewed from year to year. You also include certain regulatory features with regard to inspection and maintenance, and then want the ordinance to give authority to the Commissioner of Public Works to remove any such signs as do not comply with the requirements and regulations. We find nothing in the ordinance proposed which relates in any way to the revenue. But it seems to be designed primarily as one aimed to prohibit the maintenance of such signs even in those places where they are now permitted.

In our opinion it will be a difficult matter to draw an ordinance having for its basic principle the nuisance feature which you start out with. There is no power vested in the City Council to declare anything a nuisance which is not a nuisance in fact. While, therefore, the City has ample power to control and regulate signboards, and even to prohibit them at places where their maintenance would be a nuisance, it cannot take such sweeping measures as you call for.

As far back as January 28, 1901, the City Council passed an ordinance declaring signboards and billboards on residence streets with 200 feet of a park, boulevard or driveway to be nuisances. This ordinance was passed on by the Supreme Court in the case of *City of Chicago v. Gunning System*, 214 Ill. 628. That court at the same time passed on an ordinance that was enacted by the City Council on June 29, 1900, which was regulatory in its nature, and which also prohibited billboards on boulevards and pleasure driveways unless the consent of three-fourths of the property owners was obtained.

The general attitude of the Supreme Court with regard to this matter is expressed in the following language, which appears at page 641 in the case just cited:

“It must be apparent to all reasonable minds that provisions which are necessary in one of such cases would be wholly unnecessary and unreasonable in the others, and that a provision might be a reasonable police regulation in the one case and in one locality which would be wholly unreasonable under other circumstances in another locality. This ordinance is, however, without qualification or limitation, applicable to signs and billboards alike in all portions of the great city of Chicago—applicable alike to every portion of its extended territory. We do not hold that this ordinance is so unreasonable as to be void if it were limited to particular districts of the city.”

There is nothing in any of the subsequent decisions of our Supreme Court which indicates that it has altered its position. It held in the case of *Haller Sign Works v. Physical Culture Training School*, 249 Ill. 436, that an act of the legislature prohibiting the erection of structures for advertising purposes near parks and boulevards was invalid as being intended for æsthetic purposes, although it again stated that a reasonable ordinance regulating billboards having for its object the promotion of the safety, comfort, health, morals or material welfare of the people would be valid. In the case of *Cusack v. City of Chicago*, 267 Ill. 344, it upheld a billboard ordinance designed to protect residence districts, and this decision was sustained by the United States Supreme Court in the case of *Cusack v. City of Chicago*, 242 U. S. 526.

You will see from the above that the question of the regulation of billboards has been fairly well settled. It will be possible to sustain a reasonable ordinance providing for inspection, limitation as to size, restriction as to residence districts, labeling with name of owner, etc. It will probably be held lawful also to provide for the removal of such signs as do not meet the regulatory requirements imposed on them by law. But to condemn all signboards and billboards as nuisances, and at the same time provide for their construction and maintenance through the issuance of permits and for their destruction regardless of where they are located if such per-

mit is not taken out from year to year, would probably be held an unreasonable exercise of the police power.

If, after considering the views expressed in this letter, you come to the conclusion that there is any purpose in revising the building code in respect to this class of structures and will indicate what is wanted along that line, we will prepare such an ordinance for you.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Waiver of Fee for Record of Death.

May 6, 1926.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.

Dear Sir:

In your recent communication, addressed to the Corporation Counsel, you request an opinion as to whether the fee provided by ordinance for certified copies of records of death can be waived by your department in behalf of the recording secretary of the Policemen's Annuity and Benefit Fund.

The section of The Chicago Municipal Code of 1922 relating to fees for the issuance of such documents is as follows:

“1809. The commissioner of health is hereby authorized to issue certified copies of reports of births and deaths on file in the department of health upon payment to the city collector by the applicant of a fee of fifty cents for each such certified copy.”

I find no authority in the code for the issuance of such documents without the payment of the foregoing amount. If

it is desirable to except certain individuals or departments from the provisions of the foregoing section, such exception should be made by amending the ordinance.

An ordinance cannot be amended, repealed or suspended by an order or resolution, or other act by the City Council of less dignity than the ordinance itself. (*C. & N. P. R. R. Co. v. City of Chicago*, 174 Ill. 439.)

Respectfully submitted,

ROY S. GASKILL,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Refund of Registration Fees from Electrical Contractors.

May 6, 1926.

HON. JOHN T. MILLER, Commissioner of Gas and Electricity.

Dear Sir:

We have your letter concerning the refund of fees which were paid by electrical contractors as registration fees under ordinances passed last July which have since been held invalid. You ask to be advised as to what action should be taken by your department in regard to the refunding of those fees which are now on deposit there.

Your letter states that requests are being made for refund of the \$50 registration fee that was received from electrical contractors and which includes the \$25 for 1925

as well as the current year's fee. Some of these moneys, you say, were paid over to the City Collector and certificates of registration were issued thereon. Other fees were paid to the Department of Gas and Electricity and are now being held as a special deposit by the City Comptroller. It would seem that none of the latter have been paid to the City Collector and no certificates of registration have been issued thereon. Finally, you say, there are fees deposited with your department, such moneys being still in your possession, no certificates having been issued thereon.

This department has had occasion frequently to advise with reference to the refunding of license fees. It has always taken the position that no one has the right to refund such money without action on the part of the City Council. There are cases where there is practically a moral obligation on the part of the City to return the money, but even in such cases the City Council must act. In fact, it is only in that class of cases that the City Council itself has the right to refund the money. The law is well settled that anyone having paid in taxes or license fees voluntarily cannot maintain a suit for their recovery.

The rule that we have stated applies in the case of fees which have been received on which the certificates of registration have issued. These fees having been voluntarily paid, we do not believe that the City Council itself would be justified in ordering a refund.

With respect to those fees that are being held as a special deposit by the City Comptroller, if no certificates have been issued thereon the City Council, if it saw fit, could properly direct that moneys so held on deposit should be treated as a trust fund in escrow and returned to the persons who deposited it.

Such fees as have been deposited in your department and are still being held by you must be regarded as having been placed there to await the outcome of the examination or approval of the application for registration. That money may be returned if it is held in that way.

You will see from the above that we regard the three classes that you mention as requiring three separate methods of treatment.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Status of Strip of Land Near Michigan Avenue and
East 25th Street.**

May 8, 1926.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We have your request of March 19, 1926, desiring to know whether the ten foot strip of land lying 100 feet east of South Michigan avenue and south of East 25th street is a public highway or not.

You say taxes have always been paid on this land by the adjoining owners, and the Chicago Title and Trust Company does not recognize this strip of land as an alley. It would seem from an examination of the maps and plats that the subdivision on which this L shaped alley lies was platted before the Chicago Fire. It would also seem that every atlas or plat that is accessible for our inspection indicates that said ten foot strip of land is a public alley.

We have made a personal investigation of said strip of land, and find that three different buildings cover the entire north half of said ten foot north and south strip indicated as an alley. It would seem from the appearance of the buildings referred to that they have been there some twenty-five

to forty years. In fact, we could not find anything indicating in any way, shape or manner that said alley, or said strip of land, has or had ever been used as or for an alley.

The maps and plats all indicate an alley. The physical appearance indicates no alley. We have seen no abstract of title enabling us to determine definitely the status of this strip of land. Should the Commissioner of Public Works be desirous of opening this platted alley, he can proceed under Section 3710, Municipal Code of 1922, by notifying the occupants to remove the buildings from said alley. If the occupants are rightly in possession they will quickly produce their muniments of title, if these they have, for our inspection.

Yours very truly,

FRANK T. HUENING,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Clearance Alongside of Dry Cleaning Establishments.

May 11, 1926.

HON. JACOB M. ARVEY, Chairman, Committee on Judiciary.

Dear Sir:

This will acknowledge the receipt of your letter of May 5th relative to an ordinance recommended to the City Council by the Committee on Judiciary requiring among other things that a building used for the purpose of conducting or carrying on the business of dry cleaning shall be detached and at least 25 feet from any other building or structure or to the line of adjoining property which may be built upon.

You state that the proposed ordinance is a substitute for the ordinance requiring a clearance of 50 feet which was re-

cently held invalid by the Appellate Court; that the view of the Fire Commissioner as expressed in a letter of the Chief Fire Prevention Engineer is that a 25 foot clearance provision would be held unreasonable for the same reasons stated by the Appellate Court in holding unreasonable the 50 foot clearance requirement; that the Committee on Judiciary had in mind the decision of the court and the views of the Fire Commissioner and the Chief Fire Prevention Engineer; that it heard the testimony of representatives of the Fire Underwriters and the experience of other cities; and that it finally adopted as a compromise the 25 foot clearance provision now contained in the proposed ordinance which the Judiciary Committee has recommended to the City Council for passage.

But the present attitude of the Chief Engineer of the Fire Prevention Bureau, as disclosed by the hearings before your committee, is that the clearance provision be made 15 feet, and you wish our opinion for presentation to the City Council as to (1) what number of feet as a matter of law would be held reasonable for this purpose in view of the Appellate Court decision and the decisions of courts in other states where ordinances requiring 25 to 50 feet clearance are in force; and (2) what number of feet for clearance can we state as a result of decisions concerning ordinances of other cities should be embodied in the proposed ordinance so that it will be upheld by the courts.

We have not been able to find any reports of adjudicated cases embodying decisions concerning clearance provisions of similar ordinances of other cities to give us any light upon the subject.

As stated above, our Appellate Court, in the case of *Klever Shampay Karpet Kleaners v. City of Chicago* (No. 30323) held the 50 foot clearance provision invalid, and in its opinion among other things said:

“It has been held that the police power may extend to the destruction of private property without compensation in order to prevent the advance of an invading army, or the spread of conflagration, and the reason given is urgent public safety. In the instant case, the situation

is not of that character. If appropriate fire prevention, without *depriving the user of a large area of the property*, can be accomplished by regulation and requirements which, when conformed to, sufficiently avoid the prospective danger, then obviously the property ought not to be restricted as the ordinance provides, but should be left to the owner to use. A restriction or provision which renders real estate permanently unproductive takes away from the owner the constitutional protection of his property rights. An owner may be bound to conform to reasonable regulations, but only those *which leave him a substantial user of his property*. Here the restriction seems disproportionate to the danger.

"It is true, considering the inflammability and combustibility of various materials used in the dry cleaning business, that quite drastic requirements may be provided for, but it does not follow that in doing so it is reasonable to compel an owner, contemplating going into that business, to sacrifice or give up for the public welfare such substantial property interests as the 50 foot provision here requires, when there must be other methods such as fire-walls, forms of exits and entrances, fire-proofing; fire extinguishing apparatus, and other scientific precautions which would reasonably and sufficiently make for safety without, what the provision here in question entails, substantial confiscation of private property rights without compensation.

"In our judgment, the provision in question constitutes an unreasonable and oppressive regulation and is, therefore, invalid, and it is unconstitutional as depriving the owner of property without due process of law and without compensation."

The gist of the Appellate Court opinion was that the 50 foot clearance restriction seemed disproportionate to the danger involved in the dry cleaning business; that it was unreasonable to compel an owner to sacrifice such substantial property interests; that an owner of property may be bound to conform to reasonable regulations but only those which leave him a substantial user of his property; that if appropriate fire prevention can be accomplished without depriving the owner of a large area of his property, by requirements which sufficiently avoid the prospective danger, the property

should not be restricted as the 50 foot clearance provision provided.

However, although courts have been acting in accordance with the general principles laid down in the above opinion where unreasonableness or oppressive provisions appear, on the whole the courts have been consistently and sensibly progressive in adjusting the use of land to the necessities and conditions created by congested and complex conditions by upholding, as a constitutional exercise of the police power, ordinances passed to regulate the use of land in urban districts.

As stated in the case of *Pritz v. Messer et al.*, 112 Ohio State Rep., page 628:

“It has long been held that provisions which restrict the height of buildings have a relation to the public health and safety. *State v. Cunningham*, 97 Ohio St., 130. The first paragraph of the syllabus of this case reads as follows:

“Ordinances of a municipality reasonably regulating the height, mode of construction and use of tenement houses are a proper exercise of the police power for the preservation and promotion of the safety, health and welfare of the community. * * *’ *Welch v. Swasey*, 214 U. S., 191.

* * * * *

“Similarly restrictions as to the occupancy of lots have been upheld upon the ground that the retention of air space has a direct relation to health. *Bebb v. Jordan*, 111 Wash. 73, 189 Pac. 553, 9 A. L. R. 1035; *Building Commission of City of Detroit v. Kunin*, 181 Mich. 604, 148 N. W. 207.

“The *Bebb* case involved an ordinance of the city of Seattle, which required for an apartment building a court area for light and air of 1680 square feet and a yard area in the alley of 13 feet in depth. It was held that the ordinance was not arbitrary nor unreasonable, and that the legislature was empowered to authorize a city to enact ordinances regulating the height and character of buildings which might be erected if the regulations aimed at promoting the public health, safety and welfare and tended reasonably so to do.

“In the Detroit case an ordinance was construed which prescribed what percentage of a lot might be occupied by a tenement, and prescribed the size of the yard at the rear of the building. According to the ordinance no tenement was permitted to cover more than eighty per cent of a lot bounded by two or more intersecting streets, and the depth of the yard measured in the clear from the porches to the rear line of the lot could not be less than fifteen feet in any part. It was held that as the restrictions were for the benefit of the community as a whole and of the adjacent property, they were reasonable and not invalid.”

Although it is obvious from the language of the courts that reasonable regulations will be upheld, it would be futile for this department or anyone else to attempt to definitely predict what amount of feet of clearance might be sustained by the courts. It would all depend upon the evidence submitted to the court as to the reasonableness of the ordinance enacted—whether the restriction was proportionate to the danger involved, and whether it needlessly took from the owner of property the use of a large area of his property for the public welfare. The best legal test to apply to the matter is, what would be the minimum amount of feet of clearance necessary to promote the public safety.

The Appellate Court has said that 50 feet of clearance is taking from an owner for the public welfare too large and substantial an area of his property for this purpose, and is therefore invalid. What amount of feet of clearance would the courts sustain? It all depends upon the amount needed for the public safety without taking away an unnecessarily large area of an owner's property. That might be 15 feet or 25 feet—it all depends upon the facts showing the need of the requirement in the promotion of the public safety to be presented as evidence to the court upon the reasonableness of the provision enacted.

The general rule followed by our Supreme Court is that such problems present legislative questions which must be left to the judgment and discretion of the legislative depart-

ment, with the exercise of which the courts are reluctant to interfere unless manifestly unreasonable or oppressive.

Obviously the Appellate Court regarded the 50 foot clearance as unreasonable and oppressive as heretofore set out.

Our Supreme Court (*City of Chicago v. Mandel Bros.*, 264 Ill. 206), in sustaining a fire prevention ordinance, said:

“It is a legislative question which must be left to the judgment and discretion of the legislative department, and unless the exercise of such judgment and discretion is manifestly unreasonable, the courts will not interfere with it. It is not for a court to say that in its judgment requirements of an ordinance enacted for the promotion of public safety are too stringent, provided they are adapted to the objects sought and are not manifestly unreasonable.”

Again, in sustaining another fire prevention ordinance, the Supreme Court (*Hartman v. City of Chicago*, 282 Ill. 511) said:

“The extent to which the public safety requires the construction of buildings to be regulated, the materials which may be used and the method of construction are questions which are left to the judgment and discretion of the city council to determine, and unless the exercise of such judgment and discretion is manifestly unreasonable the courts will not interfere with it. A court will not hold an ordinance void as unreasonable where there is room for a fair difference of opinion on the question, even though the correctness of legislative judgment may be doubtful and the court may regard the ordinance as not the best which might be adopted for the purpose. The evidence is not convincing that the ordinance is manifestly unreasonable, and it does not appear upon its face to be so.”

Again in the case of *Chicago v. Washingtonian Home*, 289 Ill. 306, the court, in sustaining the ordinance requiring the installation of automatic sprinklers, said:

“The ordinance in question is not subject to the objection urged. The sprinkler apparatus is designed

to prevent the spreading of fire and to put out fires in their incipient stages, and the testimony in this record tends to establish that they are efficient in so doing. Any regulation which tends to lessen the damage and dangers of fires and prevent the spreading thereof in densely populated cities is one which tends toward the protection of life and property of the public, and is therefore, unless oppressive and unreasonable, a proper exercise of police power."

It is, therefore, our opinion that the definite number of feet of clearance to be provided in the proposed ordinance is a matter altogether within the sound discretion of the City Council, based upon its investigation of the matter, having due consideration for the opinion of the Appellate Court above referred to, the views of the Fire Commissioner and the Chief Fire Prevention Engineer, the testimony of the representatives of the Fire Underwriters, the experience of other cities and other competent facts that may have been developed by the hearings. If the clearance provision adopted is not an unreasonable or oppressive one and can be so made to appear to the courts, it will be upheld.

Very truly yours,

BARNET HODES,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Elimination of Electrical Inspectors on Account of Lack of Work.

May 11, 1926.

HON. WILLIAM E. DEVER, Mayor.

Dear Sir:

Your request for an opinion as to the legality of dismissing certain electrical inspectors, for whom appropriation was

made but whose functions have been curtailed by the recent decision of the Supreme Court in the case of *Berry v. City of Chicago*, was referred to the writer for consideration and reply.

At the last session of the General Assembly two acts were passed which were designed to give cities and villages power to regulate the installation of electrical equipment for purposes of light, heat and power. One of these authorized the registration of electrical contractors as defined therein. The other purported to give cities and villages authority over the installation, alteration and use of electrical equipment, to establish an electrical commission with certain powers among which was to prescribe standards and specifications for installation and alteration and reasonable fees for inspection, and to establish an electrical inspection department for the purpose of enforcing the prescribed regulations.

Two ordinances were passed in August, 1925, which aimed to carry into effect the powers thus granted. They took the place of the sections of the municipal code which had been held invalid in the case of *Arms v. City*, 314 Ill. 316. Later on the members of the commission thus provided for were appointed, standards and specifications were adopted by them and fees were prescribed and approved by the City Council. These ordinances were in the code at the time the Appropriation Bill of 1926 was passed, and there had been a decision of the Circuit Court regarding them which in effect sustained them as valid.

This was the status when the Appropriation Bill was passed, which carried an appropriation for 52 electrical inspectors at \$3,600 per annum, a total of \$187,200. Provision was also made for the payment of salaries to certain members of the electrical commission.

The decision in the case of *Berry v. City of Chicago* held the acts of the legislature which purported to confer the power unconstitutional. Necessarily this carried the whole structure down with it. There are at the present time no ordinances under which electrical inspection can be carried on

except the one granting general powers to the commissioner of gas and electricity to have the management of electrical inspections, and such authority to condemn faulty or dangerous installation as a public nuisance as may exist without special legislation. There is no power to collect fees therefor. Such power as exists over illuminated signs rests on another basis altogether.

It must therefore follow that the appropriation for salaries of members of the electrical commission and for electrical inspectors has been made to defray salaries of employees who have now no function to perform. The electrical commission is automatically deprived of office, and the employment of its members will cease as soon as the City Council, by order or ordinance, so directs. In the case of the electrical inspectors some doubt has been expressed as to the right of the City Council to discontinue their employment. The question whether their positions can now be eliminated arises by virtue of the fact that they are civil service employees. The services of such employees may not be dispensed with after the City Council has determined that they are necessary and should be employed, unless a condition arises that puts the situation outside of this rule, or unless the Council in its appropriation bill has made provision for limiting their employment.

Our Supreme Court, in the case of *People ex rel. Roderick v. City of Chicago*, 283 Ill. 462, held that the head of a department of the city government cannot refuse to make an appointment where a position has been created by the City Council and a vacancy exists. *A fortiori*, this will apply in case there is no vacancy and the head of the department undertakes to eliminate an employee actually in the service.

On the other hand, it was held in *Thomas v. City*, 273 Ill. 479, that the head of a department, acting in good faith, has the power to lay off such an employee for a period not exceeding 30 days on account of lack of work, lack of funds or other good cause. In addition to that the City Council has provided, in its annual appropriation bill, that the head

of a department is not required to fill a vacancy if in his judgment and discretion there is no necessity therefor.

Neither of the two situations just mentioned fits exactly the situation which has arisen. Here there is no vacancy, and the lay-off will necessarily be for more than 30 days if the positions are dropped. Nevertheless, it is reasonable and logical to assume that where the lay-off is by the express direction of the City Council and it is made in good faith for purposes of economy necessitated by a new condition that has arisen it will be within the law.

In other words, the reason the court held that the head of a department could not refuse to fill a vacancy was not because there was any lack of authority on the part of the Council to eliminate a position, but because the head of the department was acting contrary to the expressed direction of the City Council. There is no doubt whatever of the right of the City Council to eliminate a position or any number of them by simply failing to appropriate for it or them. (*Fitzsimmons v. O'Neill*, 214 Ill. 494.) Nor can it be said that the City Council, after it has made an appropriation for a position, is unable to drop it in good faith when it finds that it is no longer necessary or that the City has not the means to pay. Even though it be held that the appropriation bill cannot be amended at this time, it does not follow that the City Council is shorn of this power. It would seem that the entire question hinges on the good faith of the act. As was said in the case last cited:

“In the case at bar, there was introduced in evidence one of the rules of the civil service commission in regard to the separation and re-instatement of employes, a portion of which rule is as follows: ‘Whenever, for lack of work or lack of funds or other necessary cause, it becomes necessary in any bureau to reduce the force in any employment within the classified service, the person last certified for such employment to such bureau from an eligible register shall be laid off first.’ (Sec. 3 of Rule 13.) This rule recognizes the existence of a power in any one of the bureaus connected with the city govern-

ment to reduce the force in any employment within the classified service for lack of work, or lack of funds.''

Fitzsimmons v. O'Neill, 214 Ill. 494-507.

The limitation of thirty days which was mentioned in the *Thomas* case, above cited, was stressed in that case because there were no lay-offs for a greater period, but the court does not say that it was beyond the power of the head of a department to suspend or lay off for a longer time when acting in good faith and for purposes of economy or because there was no work. In any event, it did not indicate that it would limit the City Council in this respect, whatever view it might take of the power of the head of a department.

Therefore, while the precise point has not been directly passed upon by our reviewing courts, all the decisions lean to the view that in such a case as is here presented the City Council may direct the discontinuance of the work and drop the employees, who will be relegated to such rights as may exist in case these or other positions to which they are eligible are required to be filled in the future.

Yours truly,

LEON HORNSTEIN,

Approved: *First Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Legal Status of Billboards on South Shore Drive.

May 13, 1926.

HON. ROSS A. WOODHULL, Alderman 7th Ward.

Dear Sir:

Your communication addressed to the Corporation Counsel requesting an opinion as to the legal status of certain billboards facing South Shore Drive in the Seventh Ward

has been referred to the undersigned for consideration and reply.

In the letter accompanying your communication it is stated: "We are having a great many complaints on Coles avenue about those immense billboards on the boulevard between Coles avenue and the South Shore View Hotel. It cuts off all the view of the boulevard from the first and second apartments, also the view of the lake as we had before they were put up."

The subject of billboards and the right to construct and maintain them in the City of Chicago has received consideration from this department on several occasions. (See opinion of July 25, 1916, Opinions of Corporation Counsel, July 1, 1916 to December 31, 1919, page 32; also opinion of March 9 1917, same Vol., page 249; also opinion of August 2, 1924, Opinions of Corporation Counsel, 1924-1925, page 349).

The area on which the billboards in question are being maintained is zoned as "commercial" property. Therefore, the ordinance concerning frontage consents for the erection of billboards does not apply.

It appears from the records of the Commissioner of Buildings that a permit for the erection of the billboards in question was issued prior to January 1, 1922.

We are therefore of the opinion that said billboards are being lawfully maintained.

Respectfully submitted,

ROY S. GASKILL,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Classification of Building Used for Store, Bowling Alley and Billiard Hall.

May 17, 1926.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.

Dear Sir:

This will acknowledge receipt of your letter of May 11, 1926, requesting us to classify in accordance with Section 448 of The Chicago Municipal Code of 1922 a building used as follows:

Third floor occupied by seven bowling alleys; second floor occupied by a pool and billiard room, in which there are housed 14 pool and billiard tables; first floor occupied by a general hardware store.

The first floor of the building which is occupied as a general hardware store should be classified as Class I, which is defined as follows:

“Class I. In class I shall be included every building used for the sale, storage or manufacture of merchandise, other than department stores as described in this chapter. Also such buildings, structures or places with a ground area of five hundred square feet or more used as and for the purposes of a barn, stable or a garage or for the housing or keeping of automobiles.”

We can find no specific classification for a building used as an ordinary pool and billiard room or for a building occupied by bowling alleys. Such uses do not fall within any of the classifications enumerated under the nine classes of buildings set forth in Section 448. We are, however, advised by the Building Department that they classify such uses as Class I, presumably under Paragraph (r) of Section 448, which reads as follows:

“(r) Requirements with regard to buildings not within any of the above classes shall be determined by

the commissioner of buildings, subject to arbitration in the same manner as provided in sections 407 and 408 of this chapter."

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Liability of City for Cost of Relocating Transmission
Line Across Water Main.**

May 20, 1926.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

Your letter of the 17th instant enclosing a bill rendered by the South Park Board for the cost of relocating a transmission line pending a water main installation by the City, and requesting this office for an opinion as to the City's liability for such charge, is received.

In reply we beg to advise that it is our conclusion that the City is legally liable for the charge, assuming the amount of the bill is correct.

South Park avenue between 33d and 35th streets is under the control and jurisdiction of the South Park Board. It is the established rule in this State that the City maintains its system of water supply in its private rather than its governmental capacity, and in cases of the kind immediately involved, therefore, it can claim no advantage of the police power. And inasmuch as the particular street in question is a South Park street, the South Park Board has the prior claim to the use of the street, and the City's use of the street

for water purposes is subordinate to the Board's duty to maintain a proper lighting system. It is our judgment, therefore, that the bill should be paid.

Yours very truly,

JAMES J. COUGHLIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Riparian Rights North of Grand Avenue.

May 21, 1926.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

Your communication addressed to the corporation counsel requesting an amplification of Opinion No. 1352, relative to the status of the agreements between the Commissioners of Lincoln Park and the former riparian owners north of Grand avenue, has been referred to the undersigned for consideration and reply.

(1) Pursuant to the provisions of an act entitled "An Act to enlarge the powers of cities and villages in relation to harbors, canals, slips, * * *." etc., approved June 23, 1913, in force July 1, 1913. (Chap. 24, Paragraph 1160 *et seq.*, Cahill's Ill. Revised Statutes, 1923, otherwise known as the Harbor Act), the City Council passed an ordinance (Chapter XXXVII, Municipal Code, 1922), Section 1699 of which recites that the City of Chicago, having elected to exercise its right under the foregoing act, "reaffirms and ratifies such action, and confirms the said election and determination to exercise the right, power and authority granted by an act of

the General Assembly of the State of Illinois, approved June 23, 1913, in force July 1, 1913," hereinbefore referred to.

Section 1700 of said ordinance creates Harbor District Number 1, and defines and fixes the boundaries thereof. Sections 1701, 1702 and 1703 create Harbor Districts Numbers 2, 3 and 4 respectively, and define and fix the boundaries thereof.

The foregoing Harbor Districts thus created and defined are declared by said ordinance "to be necessary or appropriate for the uses and purposes enumerated in said act of the general assembly mentioned in Section 1699."

In and by Section 1 of said Harbor Act it is provided "That every city * * * in this State shall have the right, power and authority, and such right, power and authority are hereby granted, to acquire, own, construct, maintain and operate anywhere within the jurisdiction or limits of the city * * * or in, over and upon any public waters bordering thereon, harbors, canals, slips, * * * breakwaters and all appropriate harbor structures, facilities, connections and improvements * * *."

Section 16 of said Harbor Act provides that "Every city and village in this State shall have the right, power and authority, and the right, power and authority are hereby granted, to locate and establish dock lines and harbor lines in the public waters or rivers within the jurisdiction of, or bordering on such city or village."

The present harbor or shore line was established in accordance with the approval of the Secretary of War, dated August 9, 1921, and can not be lawfully changed or altered without Federal approval; neither can the harbor lines be changed or altered or the area east of the present shore or harbor line be used or occupied for any purpose other than commerce and navigation without such approval.

(2) The area extending approximately 400 feet north from Grand avenue and extending approximately 1,100 feet east of the easterly line of the Lake Shore Drive is described

in a certain resolution passed by the Commissioners of Lincoln Park on September 23, 1914, as "a certain area of submerged land adjacent to the shore of the Lake between the south line of Ontario street extended East and the North line of Grand avenue extended East; which said submerged land is immediately east of and adjacent to a strip of submerged land belonging to the Commissioners of Lincoln Park, lying and being fifty feet east or easterly of the line of the breakwater protecting Lake Shore Drive, extending South to the North line of Grand avenue."

In and by the foregoing resolution, a certified copy of which is submitted herewith, it is provided: "That the Commissioners of Lincoln Park gives its consent to and permits the City of Chicago to fill in the area of lands lying west or westerly from the line fifty feet east or easterly from the line of breakwater protecting Lake Shore Drive, extended south to the north line of Grand avenue."

In and by an ordinance passed by the City Council on October 5, 1914 (Council Proceedings, October 5, 1914, pages 1431, 1432), it is provided that the Harbor and Subway Commission be and it is hereby authorized to cause the Great Lakes Dredge and Dock Company to fill in a strip about 1,100 feet long and 400 feet wide lying east of the Lake Shore Drive and contiguous to and north of Grand avenue; said work to cost approximately \$200,000.

Neither the tract books in the office of the Recorder of Deeds of Cook County nor the tract books of The Chicago Title and Trust Company contain anything pertaining to the above described area extending approximately 400 feet north from Grand avenue and about 1,100 feet east of the east line of the Lake Shore Drive.

(3-4) The riparian rights settlements between the Commissioners of Lincoln Park and the former riparian owners north of Grand avenue do not in any way curtail the right of the Federal or State Governments to protect commerce and navigation in the waters of the lake immediately east of the Lake Shore Drive; neither do such settlements affect the right

of the City to condemn such riparian rights nor in the Commissioners of Lincoln Park, nor in others, for public use, subject to State and Federal approval.

Questions concerning the powers of the City of Chicago in the waters of Lake Michigan, the regulation of harbor facilities, docks, wharves and piers, have received the attention of the Corporation Counsel on several occasions. See opinion of August 17, 1912 (Opinions of Corporation Counsel, April 1, 1911, to December 31, 1912, page 1026); also opinion of July 16, 1913 (Opinions of Corporation Counsel, January 1, 1913, to October 5, 1914, page 357); also opinion of August 8, 1913 (same volume, page 412); also opinion of May 8, 1914 (same volume, page 839).

(5) In your communication you state: "The break-water about to be constructed by the City of Chicago is an urgent necessity designed to enhance the commercial use of the Municipal Pier and its construction would in no wise impair the use or value of land bordering on Lake Shore Drive."

It is possible that anyone having or claiming to have any right, title or interest in and to the lands in question may not agree with the foregoing statement, and if so, the matter would necessarily have to be adjudicated on the evidence presented in court. We therefore refrain from expressing any opinion thereon.

Respectfully submitted,

ROY S. GASKILL,
Assistant Corporation Counsel.

Concurred in:

W. A. AMBERG,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Filling Station Operated in Connection With Garage.

May 21, 1926.

MR. JOHN PLANT, Chief Fire Prevention Engineer.

Dear Sir:

This will acknowledge receipt of your communication of May 19th.

You state that the license fee for public garage is determined by the gross interior floor area; that oftentimes a space or vacant piece of ground is left outside the walls of the garage proper in which the garage owner desires to place tanks and pumps in order to sell oil.

You wish to be advised whether the use of such space for an oil filling station regardless of the tankage requires frontage consents.

Section 2279 provides that the requirements as to frontage consents shall not be applicable to the installation of a tank or tanks when the oils therein are to be used in connection with garages where such oils are incidental to the business conducted.

Section 249, as amended, granting additional privileges to public garages, reads as follows:

“249. *Additional Privileges.*) Every person, firm or corporation licensed to conduct a public garage shall have the privilege of managing, conducting, operating or carrying on a private garage within the same building, structure, premises or enclosure; and shall also have the privilege of conducting therein the business of an automobile repair shop, the business of an automobile salesroom for automobiles and automobile accessories, and the business of a filling station (provided, where a public garage license fee at the annual rate of twenty-five dollars or more, but less than fifty dollars, has been paid, that the combined capacity of all containers or tanks, either portable or stationary, for the storage of ether, carbon

bisulphite, gasoline, naphtha, benzole, hydro carbon, liquefied petroleum gas, acetone, kerosene, turpentine, or other inflammable liquids having a flash point below 165 degrees Fahrenheit, does not exceed 550 gallons; and provided, further, where such license fee at an annual rate of not less than fifty dollars has been paid, that such combined capacity does not exceed 1065 gallons) without the necessity of obtaining additional licenses."

Section 283 of The Chicago Municipal Code of 1922 defines a filling station as "any building, structure, premises, enclosure or other place within the City where a container or containers, tank or tanks, either portable or stationary, and containing gasoline (or other inflammable liquids therein mentioned), are kept or located for the purpose of selling, offering for sale or distributing any such liquids from such containers, tank or tanks."

From the above it seems clear that a filling station, as defined above, may be operated in connection with a bona fide public garage without obtaining frontage consent under Section 2279 for the installation of tanks under certain conditions. The filling station must be operated within the same building, structure, premises or enclosure as a public garage for which a license has been duly issued by the City. Where the license fee paid for the public garage is twenty-five dollars or more but less than fifty dollars, the combined capacity of all containers and tanks, whether portable or stationary, for the storage of inflammable liquids, shall not exceed 550 gallons. Where the public garage fee paid is not less than fifty dollars, the combined capacity of the containers and tanks shall not exceed 1065 gallons.

In situations not covered by the above, frontage consents must be obtained for the installation of tanks for filling stations as provided for in Section 2279.

Answering, therefore, your question specifically, we would state that frontage consents are not required under Section 2279 for the installation of tanks for a filling station outside of a *bona fide* public garage where the filling station is operated by the person, firm or corporation licensed to conduct the

public garage and upon the same premises, unless the filling station operated in connection with the garage has a capacity in excess of the requirements set forth in Section 249. That is, if an annual public garage license fee of \$25.00 or more but less than \$50.00 has been paid, the capacity of all containers and tanks must not exceed 550 gallons without the obtaining of frontage consents under Section 2279; if an annual garage license fee of not less than \$50.00 has been paid the capacity of all containers and tanks must not exceed 1065 gallons without the obtaining of frontage consents under Section 2279.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Fees Collected on Property Forfeited for Delinquent Special Assessments.

May 21, 1926.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

The letter of the Real Estate Agent under date of May 7, 1926, was referred to the writer.

The Real Estate Agent calls attention to the fact that at the close of the tax sale each year the County Collector submits a bill to the City showing a charge of 50c for each forfeited lot, which the City pays, but against which the County Clerk pays the City only 20c in case of redemption. This presents rather a complicated situation which can be explained but for which there does not seem to be any

clear remedy, unless through litigation a different interpretation is placed on some of the provisions of the statutes than is now attributed to them.

The County Collector makes up his fees in the following manner: Section 186 of the Revenue Act of 1872 as amended in 1919 authorizes a charge of 20c for sending notices by registered mail to delinquent owners prior to the date of sale. Section 22 of the Fees and Salaries Act of 1872 as amended in 1923 authorizes a fee of 20c for printing the delinquent list. Section 21 of the same act as amended in 1877 authorizes a fee of 3c for making the delinquent list for the printer, and a fee of 3c for making a list for judgment. Section 3 of the 1905 Act relating to fees in counties of the third class as amended in 1919 authorizes a fee of 4c to the County Clerk for computing and extending each penalty. With respect to the last item, the County Clerk may certify to the County Collector the amount due from the City for the service and the Collector has the right to reserve the amount so certified in making settlement.

It will be seen from the above that the fees charged by the County Collector are based on statutory provisions. Unless they are overcome by the provisions of amended Section 22 of the Fees and Salaries Act of 1872, the amount charged is correct. This section contains the provision that "no costs except printer's fee shall be charged on any lands or lots forfeited to the State." This was in the statute before it was amended in 1923 as well as now, the amendments of 1923 being merely a change so as to bring the cost in counties of the third class on lots up to 20c instead of 10c as it was before.

The provision just quoted has always been construed as meaning that no more than the amount of the printer's fee can be collected on redemption but that it does not affect the charge against the municipality levying the special assessment. The legislature may not have had such a purpose in mind when this was enacted, but unless it is altered there seems to be little chance of recovering any more than the printer's fee.

There are some things that might be done with reference to these charges. In the first place, Section 186 of the Revenue Act does not require notice to be sent where lots have been forfeited two or more years in succession next preceding the application for judgment. We are informed that most of the City's forfeitures are of this kind. Consequently, the 20c charge for mailing notices can in nearly every instance be avoided.

Again, we have been recommending purchase or withdrawal the last few years in preference to forfeiture, and we repeat our suggestion in this respect. We think that forfeitures should be held down as much as possible on account of this expense.

The County authorities regard all these costs on special assessments as collectible from the municipality making the assessment. Unless there is reason for contesting this interpretation, little can be done to overcome this expense in the case of lots actually forfeited. Doubt has also been expressed as to whether the provision limiting the costs contemplates its application only to owners and not to the municipality. We do not think the interpretations placed on these provisions by the County authorities can be successfully attacked.

Aside from the above, we have no further recommendation to make, unless you are of the opinion that we should make an effort next year to amend the statutes so as to permit the collection of the full amount of the fees on redemption.

Yours truly,

LEON HORNSTEIN,

First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Pension to Wife of Insane Policeman.

May 24, 1926.

RETIREMENT BOARD, POLICEMEN'S ANNUITY & BENEFIT FUND.

Gentlemen :

Replying to your letter of May 12, 1926, requesting an opinion as to the pension rights of the wife of an insane policeman, the following is submitted :

Your letter directs attention to the case of Anna Doyle, and states that the records of the Secretary's Office indicate that William J. Doyle was appointed a patrolman in the Chicago Police Department on October 29, 1909, and that he was discharged by the Civil Service Commission on December 29, 1916; that the record of the Secretary's Office gives the reason for Doyle's discharge as inefficiency; that it appears from the papers on file that he probably was insane at the time of his discharge.

Information furnished me is to the effect that William J. Doyle, husband of Anna Doyle, was committed to the State Hospital for the Insane on November 5, 1915; on January 2, 1923, Anna Doyle was granted a pension by the then Retirement Board as the wife of an insane policeman; that a proceeding was filed by her as the next friend of William J. Doyle against the City of Chicago in the Circuit Court of Cook County, which proceeding was dismissed on motion of the petitioner without costs on December 18, 1922.

I.

At the time William J. Doyle was committed to the insane asylum in November, 1915, there was in force and effect, in the City of Chicago, a Police Pension Fund Act which provided in Section 5 thereof for the payment of a pension of one-half of the salary, not exceeding the sum of

\$900.00, to the wife of any policeman who should legally be adjudged insane after 10 years' service and while still in the service of such City.

II.

In 1917 Section 5 of the Act of 1915 was amended to read that a certain pension should be paid to the wife of any policeman who should be legally adjudged insane, providing he had been married more than two months prior to the date he should be so declared to be insane, said pension to consist of a monthly sum produced by multiplying the number of years of service by two and one-half. This Amendatory Act of 1917 also contained the following specific provision:

“This amendatory act shall not be taken, deemed or construed as retroactive, and neither the pensions granted under the Act to which this is an amendment, nor the amounts thereof, shall in any wise be affected except as is specifically provided for in this amendatory act.”

III.

William J. Doyle had not served 10 years in the Police Department at the time he was adjudged insane, and as our courts have held that “service” means actual service, Mr. Doyle was not entitled to be credited with any period of time following the adjudication of insanity as time of service in the Police Department. His wife, Anna Doyle, was therefore not entitled to a pension under the Pension Act of 1915.

IV.

While the Amendatory Act of 1917 removed the condition of 10 years' service as applied in pensions based upon insanity, the change in the law was specifically stated in the Amendatory Act to not be retroactive. Anna Doyle was therefore not entitled to a pension under the Amendatory Act of 1917.

V.

Under the facts as presented to me, I am of the opinion that the pension heretofore granted to Anna Doyle was granted in error, and that she is not entitled to receive a pension as the wife of an insane policeman.

Yours respectfully,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Service Credit of Person Receiving Disability Benefit.

May 24, 1926.

RETIREMENT BOARD, MUNICIPAL EMPLOYEES' ANNUITY & BENEFIT FUND.

Gentlemen:

Complying with your request of May 22, 1926, for an opinion as to the service credits of a person receiving disability benefit from your fund, the following is submitted:

Your letter requests an opinion concerning the status of Mrs. Minnie Muir, a police matron who has been receiving disability benefits under the Act of 1911 from your fund since November 11, 1918, and who has applied for age and service annuity as of June 1, 1926, being 69 years of age.

Your letter states that at the time the 1921 Municipal Employees' Annuity & Benefit Fund Act came into effect the question of transferring the police matrons who had been contributors to the 1911 Municipal Pension Fund was taken

up with Mr. James W. Breen, then first assistant corporation counsel, and that he advised that matrons receiving disability benefits from the Municipal Pension Fund could not be transferred to the Policemen's Pension Fund on account of the said matrons being listed by the Police Department as "being out of the service," and that your fund has been paying Mrs. Muir 1911 disability benefits at the rate of \$50 per month, less the amount of 1911 contribution of \$2.50 per month, making a net benefit of \$47.50 per month.

The information furnished me is to the effect that Mrs. Minnie Muir became a police matron on April 8, 1907; that she was a beneficiary of the Municipal Pension Fund and as such was granted disability benefit on November 11, 1918, and that she has continued to draw such disability benefit to the present time.

In the case of *Carpenter v. City*, 199 Ill. App. 558, the Appellate Court held that "service" so far as related to a right to a pension means "actual service." A certiorari was denied in this case by the Supreme Court of Illinois, which makes this holding final and binding. As Mrs. Muir rendered actual service only from April 8, 1907, to November 11, 1918, her period of actual service was only 11 years, 7 months and three days, and she is not entitled to retire on age and service pension or to be granted an age and service annuity under any pension law.

Yours respectfully,

GEORGE F. MULLIGAN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Condition of Buildings on South Water Street.

May 25, 1926.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

Your communication addressed to the Corporation Counsel with reference to the alleged dangerous condition of certain buildings on East South Water street, and requesting an opinion as to how to proceed in the matter, has been referred to the undersigned for consideration and reply.

Attached to your communication is a letter bearing date of May 18, 1926, addressed to you by John J. Sloan, President of the Board of Local Improvements, wherein it is stated:

"The buildings east of State Street on the south side of South Water Street are in very poor condition and we believe that building No. 11 East South Water Street should be condemned and torn down as the joists at present are practically free of the east wall.

"The buildings east of No. 11 are leaning toward the Jewelers Building. In other words, they have settled on the east side due to the excavations made for the foundations of the new Jewelers Building and the party wall has pulled away from the east side of building No. 11 East South Water Street.

"We believe that the building is in such a precarious condition that unless the property owners take steps to shore the same immediately, it is liable to collapse. The building may collapse eastward and cause the buildings at 19 and 23 East South Water Street to collapse also."

Under the facts above stated, the question with reference to the premises at No. 11 East South Water street appears to be one to be adjusted between the owners thereof and the adjoining property. However, if the building is in a dangerous condition structurally, your department has ample au-

thority under the ordinances of the City to compel the owners thereof to put the same into safe condition for use, or close the building.

There is also attached to your communication another letter addressed to you under date of May 18, 1926, from the president of the Board of Local Improvements, with reference to the building at No. 23 East South Water street, wherein it is stated:

“Please be advised that at this point we are making an excavation of about fourteen feet from present levels cutting through the base of the piers which project beyond the street line and if the piers project beyond the street line as most of the buildings along there have done, we will cut through the pier from two to six inches.

“In addition to that, this building is settled to the east about eleven inches according to our survey and our attorneys advise we are strictly within our rights in cutting off any projecting portions of the structure beyond the street line and that it is up to the owners of the property to protect their building in the excavation that the city is making along Wacker Drive.

“Mr. Myers, of Rapp and Rapp, was in our Engineer’s office this morning wanting to know if we were going to shore this building and he was distinctly told we were not and it is up to the property holders there to protect the structures.”

The foregoing communication presents an entirely different situation and involves the question of the liability of the City of Chicago for damages occasioned, or that will be occasioned, by construction of a public improvement in a public highway.

A great many cases have been brought against the City for damages alleged to have been occasioned to abutting property by the construction of the Wacker drive improvement and we would not venture an opinion as to the liability in any particular case without having been afforded an opportunity to go over the matter very carefully and ascertain in detail all of the different factors involved.

In the instant case we have no evidence before us as to whether the piers projecting beyond the street line were or were not originally constructed with the approval and permission of the City. It is evident that such piers and footings were installed many years ago and this suggests a very careful inquiry in view of the language used by our courts of review in the case of *Nixon v. City of Chicago*, 212 Ill. App. 365, *Bernard v. City of Chicago*, 270 Ill. 27, and other cases.

The South Water street improvement, having been constructed by special assessment under proceedings brought under the statute relating to special assessments, the owners of the property who were made parties to said special assessment proceedings have no claims against the City except for consequential damages arising as the result of the construction and maintenance of said improvement, all other damages, if any, being presumed to have been taken into consideration in fixing the assessment against the property for benefits (*City of Chicago v. Lord*, 282 Ill. 120, and *City of Chicago v. Lord*, 277 Ill. 590).

We suggest that you give the usual notice and pursue the course usually followed by your department in the matter of dangerous buildings and put the burden upon the property owner of either suing the City for damages or enjoining the City officials from taking such proceedings. In this way the burden of any litigation will be placed upon the property owners and we will have an opportunity of going into the matter fully in a proper court proceeding.

Very truly yours,

ROY S. GASKILL,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Frontage Consents in Case of Additional Installation of Oil Tanks.

May 26, 1926.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

This will acknowledge the receipt of your letter of May 8th.

Section 2279 of The Chicago Municipal Code of 1922 provides: "It shall be unlawful to install any tank or tanks for the storage of any of the liquids mentioned in section 2277 in any lot or plot of ground without first obtaining the written consents of the property owners representing the majority of the total frontage in feet of any lot or plot of ground lying wholly or in part within lines 150 feet distant from and parallel to the boundaries of the lot or plot of ground upon which said tank or tanks is or are to be installed."

Prior to the enactment of said Section 2279 a city ordinance required that no filling station could be constructed "on any lot in any block or square in which two-thirds of the improved property according to frontage on both sides of the streets surrounding such block or square is used exclusively for residence purposes, without the written consent of a majority of the property owners according to frontage on both sides of the streets surrounding such block or square."

Under the latter ordinance in a number of cases two-thirds of the frontage specified was not used exclusively for residence purposes and permits were issued to install tanks for gasoline filling stations without any frontage consents having been filed, none being needed under the ordinance. A number of these stations still exist and have been continuously operated under the licenses required by the City ordinances. Many of these stations have recently filed applications for an additional tank, and you wish to be advised

whether you should require frontage consents at this time for the installation of such additional tanks under Section 2279.

This department has heretofore passed on somewhat similar questions. We have held that a garage erected before frontage consents were required might be operated after the passage of the ordinance requiring frontage consents even though the ordinance required such consents for the "maintenance" of such business, as well as for the location and construction of same; that a hospital erected before frontage consents were required for hospitals might be enlarged after the passage of the ordinance requiring frontage consents for hospitals, provided the addition is upon the same property originally purchased and used for hospital purposes, etc.

While the question here presented is somewhat different, the principle involved is the same. The filling station is there now. At the time of its establishment it complied with the then existing ordinances. It has been operated continuously under licenses issued by the City. Rights were acquired before the present ordinance was enacted. What the present ordinance requiring frontage consents seeks to do is to give the adjacent property owners the right to say whether or not they wish to have in their vicinity a business or use which may because of the manner of its operation become obnoxious. But the use is already there and already duly licensed by the City.

Without going into unnecessary further details, therefore, it is our opinion that frontage consents are not required under Section 2279 for such an additional tank, provided it is installed upon the lot or plot of ground now used for the purpose of a filling station.

Very truly yours,

WILLIAM L. SULLIVAN,

Approved:

Assistant Corporation Counsel.

FRANCIS X. BUSCH,

Corporation Counsel.

Dropping of Advertising Matter from Airplanes.

May 26, 1926.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

In your letter of May 24th you state that an improvement club in your ward complains because pamphlets and printed matter are being scattered by an aeroplane, and ask what can be done to stop the nuisance.

Section 172 of The Chicago Municipal Code of 1922 is as follows:

“172. PROHIBITIONS.) No person shall guide any aircraft in a manner designed to give any demonstration of trick flying or stunt flying or aerial acrobatics or give any manipulation of the controls which may tend to divert the aircraft from such a normal flight as is attended with every consideration for stability and safety.

“No person shall fly over any part or section within the limits of the city of Chicago at a height lower than that enabling such aircraft to glide in any emergency and at all times to a known, established or recognized open or unobstructed place of landing on land or water, nor shall any person under any circumstances, special or otherwise, fly at a height lower than 2,000 feet except at the beginning or end of a flight.

“No person in any aircraft shall cause or permit to be thrown out, discharged or dropped, any ballast, instruments, tools, containers, handbills, circulars, cards or other matter whatsoever, unless it be directly over a place established for that purpose, and all equipment carried in aircraft shall be adequately fastened in place before leaving the ground.”

The practice complained of is clearly within the prohibition of the third paragraph of this section, and if the pilot or owner of the plane is known, it should be a comparatively simple matter to direct the attention of the Police Depart-

ment to the violation, which is punishable (under Section 175) by a fine of not less than \$50 nor more than \$200 for each offense.

Respectfully submitted,

CHARLES R. LARRABEE ,
Assistant Corporation Counsel.

Approved :

FRANCIS X. BUSCH,
Corporation Counsel.

Proposed Fee for Taking Civil Service Examination.

May 27, 1926.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

My Dear Alderman :

I am in receipt of your letter of the 25th instant attaching copy of resolution introduced at a recent meeting of the City Council directing the Committee on Finance, through its advisory Commission on Revenue, to report to the council such orders, ordinances or resolutions as in its judgment may be advisable for the purpose of fixing a nominal fee to applicants taking civil service examinations. You ask for the opinion of this department as to whether such an ordinance would be legal.

Section 6 of the Civil Service Law governing examinations provides :

“Examinations. All applicants for offices or places in said classified service, except those mentioned in section eleven, shall be subjected to examination, which shall be public, competitive and free to all citizens of the United States, with specified limitations as to residence, age, health, habits and moral character.”

While the word "free," as used in this section is undoubtedly used as the equivalent to the word "open," meaning that all examinations shall be available alike to all citizens, the remainder of the sentence, viz, "with specified limitations as to residence, age, health, habits and moral character," has been construed by the courts as excluding any other limitations or restrictions upon such examinations.

The proposal to charge applicants for examinations for positions in the classified service an entrance or examination fee is, in my opinion, clearly contrary to the letter and spirit of the Civil Service Law, and any regulation, resolution, order or ordinance to that effect would be clearly invalid.

Respectfully yours,

FRANCIS X. BUSCH,

Corporation Counsel.

Installation of Oil Tanks for Different Classes of Liquids.

May 28, 1926.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

This will acknowledge the receipt of your letter of May 28th requesting the views of this department.

Application has been made to you for a permit to install 24 tanks for oils in premises at 2607-2641 Keeler avenue. Each tank is to be of 11,750 gallon capacity. 13 of said tanks are to contain class 1 and 2 liquids, and the balance, we are advised, would contain class 4 liquids.

Proper frontage consents, you state, have been filed, and the site of the proposed tank has been approved by your department, but permit has been withheld for the reason that Section 2305 of The Chicago Municipal Code of 1922 provides

that the aggregate capacity of tanks for class 1 and 2 liquids in any yard shall not exceed 150,000 gallons, and Section 2351 provides that the aggregate capacity of class 4 liquids in any one yard, enclosure or plant shall not exceed 300,000 gallons.

We have examined the provisions of the sections of the ordinances referred to and can find nothing therein prohibiting the installation of tanks to contain class 1 and 2 liquids in the same yard or enclosure with tanks containing class 4 liquids. The capacity of the tanks for the class 1 and 2 liquids, however, may not exceed 150,000 gallons, while the tanks for the class 4 liquids may not exceed 300,000 capacity.

We see no reason, therefore, from an inspection of the ordinances or from any matter in relation thereto that has been called to our attention, why you should not issue a permit for the installation of tanks for class 1 and 2 liquids, provided that the aggregate capacity of such tanks shall not exceed 150,000 gallons; and for tanks for class 4 liquids, provided the aggregate capacity of such tanks for class 4 liquids shall not exceed 300,000 gallons.

There is no prohibition in the ordinance as far as we are aware prohibiting tanks to contain the different classes of liquids being installed in the same yard, enclosure or plant.

Very truly yours,

WILLIAM L. SULLIVAN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Oil Tanks in Public Garage Near Theater.

May 29, 1926.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

This will acknowledge receipt of your letter of May 24th relative to application made to you by Mr. Albert S. Quan to install two 500 gallon tanks for the sale of gasoline at 6420-6448 Sheridan Road. Mr. Quan conducts there an open air garage under license No. 366, for which, you state, he paid \$174.

The premises, however, are within 200 feet of a theater now in the course of erection, and you wish to be advised whether a permit to install the tanks would be in conformity with the provisions of the ordinances.

Section 249 of The Chicago Municipal Code of 1922 provides that "every person * * * licensed to conduct a public garage shall have the privilege of * * * conducting therein the business of a filling station, provided that the combined capacity of all containers or tanks, either portable or stationary, for the storage of ether, carbon bisulphate, gasoline, naphtha, benzole, hydro carbon, liquefied petroleum gas, acetone, kerosene, turpentine, or other inflammable liquids having a flash point below 165 degrees Fahrenheit, does not exceed 550 gallons; and, provided, further, where such license fee at an annual rate of not less than fifty dollars has been paid, that such combined capacity does not exceed 1065 gallons, without the necessity of obtaining additional licenses."

Section 2279 provides in part as follows:

"(b) It shall be unlawful to install any tank or tanks for the storage of any of the liquids mentioned in section 2277 in any lot or plot of ground without first obtaining the written consents of the property owners

representing the majority of the total frontage in feet of any lot or plot of ground lying wholly or in part within lines 150 feet distant from and parallel to the boundaries of the lot or plot of ground upon which said tank or tanks is or are to be installed; provided, however, that for the purpose of this ordinance only the frontage of any such lot or plot of ground or that part of the frontage of any part of such lot or plot of ground as comes within the 150 foot limit herein prescribed shall be considered; and, further provided, that any and all petitions containing such consents of property owners shall be based on and contain the legal description of the property affected. No such tank or tanks shall be installed in any lot or plot of ground where any of the boundaries of any such lot or plot of ground are within 200 feet of the nearest boundary of any lot or plot of ground used for a school, hospital, church or theater. *These provisions shall not be applicable to the installation of a tank or tanks containing any of the oils referred to in section 2277 when such oils are to be used in connection with garages or manufacturing plants where such oils are incidental to the business conducted or oils used for fuel purposes;* provided further, that for the purposes of this ordinance, whenever the lot or plot of ground in which such tank or tanks is or are to be installed is in any shape other than a rectangle, the 150 foot limiting line aforementioned shall not exceed in distance 150 feet from any point in the boundaries of such lot or plot of ground."

Section 2279, it will be seen, requires certain frontage consents for the installation of tanks for the storage of inflammable liquids, and further requires that no such tanks may be installed in any lot or plot of ground the boundaries of which are within 200 feet of the nearest boundary of any lot or plot of ground used for a school, church, hospital or theater. But the section further goes on to say that its provisions do not apply when the inflammable liquids are to be used in connection with garages or manufacturing plants where such oils are incidental to the business conducted.

There is no provision in the ordinances requiring that a public garage may not be erected within a specified distance

from a theater, although there is a provision that a public garage may not be erected within 200 feet of a hospital, church or public or parochial school.

Sections 249 and 2279 of The Chicago Municipal Code of 1922 should be construed together. So construing them, it is our opinion that if the two 500 gallon tanks for the sale of gasoline are to be used in connection with the public garage and as an additional privilege as set forth in Section 249, under the license fee paid for public garage license, then the provision of Section 2279 as to the prohibited distance of the tanks from a theater has no application.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Custody of Reports Made by Physicians on Cases of Tuberculosis.

June 2, 1926.

HON. A. A. SPRAGUE, President, Board of Health.

My Dear Mr. President:

Under date of May 21st you requested the opinion of the Law Department as to the proper custody of reports made by physicians and others of cases of tuberculosis coming to their knowledge, the precise question involved being whether these records should be within the immediate custody of the Department of Health of the City of Chicago or of the Municipal Tuberculosis Sanitarium.

The determination of this question involves an examination and consideration of the statutes of the State, the rules

of the State Board of Health and the ordinances of the City of Chicago.

Section 1 of An Act to provide for the registration of all births, stillbirths and deaths in the State of Illinois (Chapter 65A, Cahill's Revised Statutes, Section 17), provides "that the State Board of Health shall have charge of the registration of births, stillbirths and deaths throughout the State."

Section 3 of the same act provides for the appointment of "local registrars."

Section 4 of the same act provides "*that in cities, villages and incorporated towns in which registration of births, stillbirths, or deaths is conducted under local ordinance, the officer of the city, village or incorporated town who is local registrar under such ordinance shall be the local registrar under this Act, and such local registrar shall be subject to the rules and regulations of the State Board of Health.*"

Section 5 of the same act provides, "that the body of any person whose death has occurred in the State or which shall have been found therein, shall not be interred or disinterred, deposited in a vault or tomb, cremated or otherwise disposed of, or removed from or into or from place to place in any registration district, nor shall it be temporarily held pending further disposition more than seventy-two hours after death, unless a permit for burial, removal or other disposition thereof shall have been properly issued by the local registrar, deputy or sub-registrar of the registration district in which the death occurred or the body was found. *No burial or removal permit shall be issued by any such registrar (local registrar) until, whenever practicable, a complete and satisfactory certificate of death has been filed with him as hereinafter provided.*"

Section 17 provides that "the State Board of Health shall prescribe all forms of reports * * * and that in said incorporated town or village the local department or board of health or the city clerk, as the case may be, may have printed blank forms bearing such items of record or instructions as

may be necessary for the needs and purposes of carrying out the provisions of local ordinances, not in conflict with the forms prescribed or approved by the State Board of Health."

As you state in your communication, Rule 2 of the Rules and Regulations of the Illinois Department of Public Health for the Control of Tuberculosis states:

"Every physician, laboratory director, nurse or other attendant, superintendent of any hospital, asylum, orphanage, jail or similar institution, teacher in any school, proprietor or manager of any business, hotel, lodging or boarding house, parent, guardian, householder, or any other person having knowledge of a known or suspected case of tuberculosis, shall immediately report such known or suspected case of tuberculosis in writing or by telephone to the local health authority. Every case reported by telephone shall be followed with a written report within twelve hours. Upon receipt of such report the local health authority shall within twelve hours forward copy of the same to the Illinois Department of Public Health, Springfield, Illinois. Every case developing on the premises subsequent to the first reported case shall likewise be reported."

Section 1778 of The Chicago Municipal Code of 1922 provides:

"(Records and books.) It shall be the duty of the commissioner of health to provide the necessary books for keeping a record of all transactions of said department, including the proper registration of births and deaths, and such other statistical information necessary for the efficient working of said department; and he shall also keep on hand all necessary blanks, to be used by physicians and midwives, and furnish them with the same on application."

Section 1808 of the same code provides:

"(Deaths—physicians must report.) It shall be the duty of every physician to make a written report to the department of health within twenty-four hours of the death of any of his or her patients, occurring within the

corporate jurisdiction of said department of health; provided, that if a coroner's inquest is called in respect to any such death, the report shall be made to said department of health by the coroner.

All such reports shall be made on blank forms to be furnished by said department of health and shall contain such information as said department of health shall require."

Section 1812 of the same code provides:

"(Physicians to report.) Every physician who shall prescribe for or attend any person having or suspected of having a contagious, epidemic or communicable disease, such as cholera, yellow fever, scarlet fever, diphtheria, typhus, typhoid fever, smallpox, varioloid, puerperal fever, membranous croup, measles, whooping cough, tuberculosis, influenza, pneumonia, cerebrospinal fever, septic sore throat, or any of the grades of such diseases, or any other diseases designated as contagious, epidemic or communicable by the commissioner of health, shall, within twenty-four hours after first discovering the existence of such disease, make a report thereof in writing to the commissioner of health, which report shall give the name, if known, and the place of residence, of the person having such disease, together with the character and state of his disease."

There is no specific provision in the Municipal Tuberculosis Sanitarium Act (Chapter 24, Cahill's Revised Statutes, Section 586-605), requiring the keeping of records. The only language in the statute which would authorize the requiring of reports or the keeping of records is the general language of Section 6, which provides, "That they (the directors) shall make and adopt such by-laws, rules and regulations for their own guidance and for the government of the sanitarium and the branches, dispensaries and auxiliary institutions and activities connected therewith as may be expedient, *not inconsistent with this Act and the ordinances of such city or village.*"

Upon consideration of the various statutory and ordinance provisions above quoted, it would seem clear:

1. That the enforcing officer of the health ordinances of the City of Chicago is a local registrar within the terms of Section 4 of the state statute requiring reports of births, stillbirths and deaths, and that as such local registrar he must compel presentation to him of death certificates before burial permits can be issued and that such certificates must be "complete and satisfactory." This language imposes an obligation and implies the authority to investigate into the causes of death in order to determine the verity of such death certificates.

2. That as such local registrar, such enforcing officer is subject to the rules and regulations of the State Board of Health, passed in pursuance of the statute, and is bound by the rule requiring him to receive from physicians and others and transmit to the State Department of Health at Springfield copies of reports lawfully made to him of known or suspected cases of tuberculosis.

3. That the present City ordinances compel physicians to report cases of contagious, epidemic and communicable diseases, tuberculosis being specifically mentioned as one, to the Commissioner of Health.

4. That there is no specific authorization in the Municipal Tuberculosis Sanitarium Act for requiring reports from physicians and others of cases of tuberculosis to be sent directly to the Municipal Tuberculosis Sanitarium rather than to the Department of Health, and any rule or regulation to that effect would be ineffective because in conflict with the existing City ordinances.

Undoubtedly the directors of the Municipal Tuberculosis Sanitarium have the right to prescribe forms and provide for and keep such records as are necessary for the proper government of the sanitarium and the branches, dispensaries and auxiliary interests and activities thereof, provided such rules are consistent with the other provisions of the Municipal Tuberculosis Sanitarium Act and consistent with the existing ordinances of the City of Chicago. It goes without saying that such records and rules and regulations of the Sanitarium

concerning them must be in harmony with the Public Health Statute.

Our investigation discloses that the records at present kept in the custody of the Municipal Tuberculosis Sanitarium are of two kinds:

(1) The reports of physicians and others of known and suspected cases of tuberculosis which are sent in the first instance to the Health Commissioner and by him transmitted to a branch of the Municipal Tuberculosis Sanitarium located at 952 North Michigan avenue and there kept in custody.

(2) Card index records made by nurses and others employed by the Municipal Tuberculosis Sanitarium of visits to and treatment of patients known or suspected to have tuberculosis.

There is no question in my opinion but what the records of the first class are records belonging to the Department of Health, and because of statutory and ordinance provisions above referred to should be kept in the custody of the Department of Health. Records of the second class above mentioned, on the other hand, are created by the Municipal Tuberculosis Sanitarium independently of statutory or ordinance requirements and are properly a part of the files and records, and should remain in the custody of, the Municipal Tuberculosis Sanitarium.

It is obvious that there is considerable interdependency and necessary association between the Municipal Tuberculosis Sanitarium and the Department of Health, and the records of one body should at all times be freely accessible to the other in order that the best interests of the public may be served.

Respectfully submitted,

FRANCIS X. BUSCH,

Corporation Counsel.

Necessity of Frontage Consents for Open Air Garages.

June 3, 1926.

HON. FRANCIS L. BOUTELL, Alderman 48th Ward.

Dear Sir:

This will acknowledge receipt of your letter of May 28th with reference to the operation of an outdoor garage at the northwest corner of Sunnyside and Clarendon avenues.

There is an oil station, you state, located on the corner and an open air garage maintained in the rear portion of the lot which is enclosed by a fence.

You wish to be advised what frontage consents are necessary for the operation of a garage at the above location as well as for the operation of the oil station; whether when frontage consents are obtained for the operation of an oil station it would be necessary also to obtain any additional frontage consents for the operation of an open air garage; and whether it is necessary to obtain the same frontage consents for the operation of an open air garage as for a garage maintained in a building.

The garage and oil station are located, as we understand it, on premises zoned for commercial purposes. There would therefore be no violation of the Zoning Ordinance involved in their operation.

Frontage consents are required for the operation of a public garage, provided two-thirds of the buildings in the block on both sides of the street are used exclusively for residence purposes or provided the garage is within 100 feet of any such street in any such block. This applies whether the garage is maintained in a building or whether the garage is what is known as an open air garage.

In relation to gasoline filling stations, Section 2279 provides that no tank or tanks may be installed "in any lot or plot of ground without first obtaining the written consents of the property owners representing the majority of the total

frontage in feet of any lot or plot of ground lying wholly or in part within lines 150 feet distant from and parallel to the boundaries of the lot or plot of ground on which said tank or tanks is or are to be installed.”

Section 2279 also provides, however, that requirements as to frontage consents shall not be applicable to the installation of a tank or tanks when the oils therein are to be used in connection with garages or manufacturing plants where such oils are incidental to the business conducted or oils used for fuel purposes.

Section 249 of The Chicago Municipal Code of 1922 provides that a filling station of a certain capacity may be operated in connection with a public garage without an additional license, and reads as follows:

“249. *Additional privileges.*) Every person, firm or corporation licensed to conduct a public garage shall have the privilege of managing, conducting, operating or carrying on a private garage within the same building, structure, premises or enclosure; and shall also have the privilege of conducting therein the business of an automobile repair shop, the business of an automobile salesroom for automobiles and automobile accessories, and the business of a filling station (*provided, where a public garage license fee at the annual rate of twenty-five dollars or more, but less than fifty dollars, has been paid, that the combined capacity of all containers or tanks, either portable or stationary, for the storage of ether, carbon bisulphite, gasoline, naphtha, benzole, hydro carbon, liquefied petroleum gas, acetone, kerosene, turpentine, or other inflammable liquids having a flash point below 165 degrees Fahrenheit, does not exceed 550 gallons; and, provided, further, where such license fee at an annual rate of not less than fifty dollars has been paid, that such combined capacity does not exceed 1065 gallons*) without the necessity of obtaining additional licenses.”

From the above you will see that a filling station as defined above if operated in connection with a garage may be maintained without obtaining additional licenses, provided that where the license fee paid for the public garage is \$25 or

more and less than \$50.00 the combined capacity of all containers and tanks, whether portable or stationary, for the storage of inflammable liquids shall not exceed 550 gallons, and provided where the public garage license fee paid is not less than \$50.00 the combined capacity of containers and tanks shall not exceed 1065 gallons.

In other situations frontage consents must be obtained for the installation of tanks for filling stations as provided for in Section 2279.

So that while filling stations of certain sizes may be operated in connection with duly licensed garages without securing additional licenses, yet in no case may a garage which requires frontage consents be operated in connection with a filling station because frontage consents have been obtained for the filling station. An altogether different character of frontage consents is required for a garage than for a filling station.

If, therefore, the garage in question is located in a block in which two-thirds of the buildings on both sides of the street are used exclusively for residence purposes or within 100 feet of any such street in any such block, frontage consents would have been necessary before a license could be obtained for the operation of the garage.

Also a different character of frontage consents as above set forth would have been necessary, under Section 2279, for the permit for the installation of the tanks for the oil filling station, because the latter, as we understand it, is not being operated as an additional privilege to a duly licensed garage under Section 249.

If there is any further information that we can give you in reference to the above matter, we hope you will let us know.

Very truly yours,

WILLIAM L. SULLIVAN,

Approved:

Assistant Corporation Counsel.

FRANCIS X. BUSCH,
Corporation Counsel.

Reconstruction of Conduit by Park Commissioners Across Water Main.

June 3, 1926.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

Your letter of April 20th last, enclosing attached correspondence with reference to a bill submitted to the Water Pipe Extension Department by South Park Commissioners, covering the cost of removing and replacing a conduit containing transmission lines in order to permit the construction of a water main by the City in West Thirty-ninth street, is received. Your letter inquires whether the City is liable for the amount claimed.

A considerable number of similar claims have heretofore been approved on the uncertain theory that the City in the construction, maintenance and operation of its water supply system functions in a private capacity the same as any utility company; that acting in such private capacity the City can claim no advantage; that it is in no better or worse position than any private individual or corporation, and must, therefore, pay the bill.

We have never been completely satisfied that such reasoning is unimpeachably sound, and inasmuch as the City's generosity in this respect seems to have been taxed to the limit, we have concluded that in common justice to the City we should defer the payment of any more until some court of competent jurisdiction says that we must. The South Park Board is merely a permissive user of the City street, and so far as we are aware is not paying any compensation to the City for the use of the street. The Park Board enjoys about the same status as a tenant at sufferance in the streets so occupied. The fee of the streets is in the City and its right of

occupancy for unlawful and legitimate purposes, whether public or private, is certainly paramount to that of any permissive user.

The situation at hand presents a rather vexing question, and we hesitate to predict what its ultimate determination will be, but we have concluded that instead of passively approving such claims *ad infinitum*, there should be a judicial determination of our rights and liabilities in the premises.

Yours very truly,

JAMES J. COUGHLIN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Status of Loyola University Building With Reference to Remodeling.

June 8, 1926.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

This will acknowledge the receipt of your letter of June 5th transmitting a communication from Rev. F. Seidenberg, Dean of the School of Sociology of Loyola University, and a plan showing changes which the university desires to make in an existing building at 20-28 N. Franklin street.

It appears that after the remodeling and changes take place the first floor of the building will contain stores. The upper three stories will be divided into rooms used for offices and rooms used for class room purposes, about 50 per cent of the upper three floors being used for class rooms. The stu-

dents will be all adult students and the number using the class rooms will vary from 200 to 300.

The building fronts on Franklin street and is completely surrounded at the rear and sides by alleys. Besides the present fire escapes on two sides of the building, the structure after the proposed changes are made will have two additional fireproof staircases from the top floor to the ground.

"It is the purpose of the owners," you state, "to change the entire building to slow-burning construction," and you wish to be advised whether you may issue the permit.

The first floor will be used for class I purposes. Section 453 provides that a class I building of slow-burning construction may not be built more than 7 stories in height.

"It is proposed," you state, "to use the three upper floors by dividing them into rooms, part of the rooms to be used for office purposes and part of the rooms to be used for class room purposes."

Section 695 provides that, "In Class VIII shall be included every building used for school purposes and every building containing class rooms for special or general instruction."

Section 697 provides that, "All buildings hereafter erected and used or intended to be used *wholly* for the purposes of Class VIII shall be constructed in accordance with the provisions of this chapter relating to Class VIII." It also provides that buildings having a seating capacity between 200 and 400 and which are not over three stories and basement in height may be built of slow-burning construction; that buildings which have a greater seating capacity than 400 or which are more than three stories and basement in height shall be built entirely of fireproof construction.

Where it is sought to erect a building to be used wholly for the purposes of class VIII (school) purposes there is no doubt that if the building is four stories in height it must be built entirely of fireproof construction.

Here, however, a building is to be remodeled and is not to be used wholly for class VIII (school) purposes. The first floor is to be used entirely for class I (store) purposes and about 50 per cent of the upper three floors are to contain class rooms to be used for class VIII (school) purposes.

Section 449 provides that, where any building is used for the purposes of two or more classes, such portion of any such building as is devoted to the uses and purposes of any particular class shall be constructed, operated and maintained in accordance with the requirements of this chapter relating to such class unless there would be a conflict between the provisions of the code relating to the construction of buildings, in which case the construction requirements which relate to and govern the construction of buildings of the class requiring the best and safest form of construction shall govern the entire building.

Section 727, to which you call our attention, reads as follows:

“727. *Alterations of existing buildings.*) (a) In construing the several sections of this chapter, said sections shall not be construed as requiring alterations in the construction or equipment of buildings or structures in existence at the time of the passage of this chapter, except where specifically provided, unless such buildings shall not have sufficient or adequate means of egress therefrom or ingress thereto by reason of insufficient or inadequate stairways or stairways improperly located, or insufficient or inadequate elevators or elevator equipment, doors, fire escapes, windows or other means of egress or ingress, and except also as required in sections which are herein made retroactive.

(b) Whenever an inspector of buildings shall make a report to the commissioner of buildings that any such building has inadequate or insufficient means of egress therefrom or ingress thereto, as aforesaid, the commissioner of buildings shall notify the owner, agent, or person in possession, charge or control of such building of such fact and direct him forthwith to make such alterations and changes in the construction or equipment of such building as are necessary to be made in order to

make such building comply with the requirements of this chapter.

(c) If, however, it is desired to enlarge, or in any manner materially modify, the construction of any existing building, or to make a change in its use or occupation which will transfer it from one class, as recognized by this chapter, to another class, then, before such enlargement or structural change or modification of building is made, or before such change in its use or occupation may be made, written notice shall be given to the commissioner of buildings of the intention to change the character of the use, and the entire building shall be reconstructed or modified in such manner as to bring the same, when enlarged or altered, or when occupied for its new and different purposes, into compliance with the provisions of this chapter."

In an opinion of this department dated July 17, 1914, to one of your predecessors, this department went somewhat fully into the matter of the proper interpretation of the above quoted Section 727.

Where it is sought to remodel an existing building in such a manner that the first floor shall be devoted to class I purposes and that the upper three floors are to be used for the purposes of class VIII, because about 50 per cent of them will be used for class room purposes, the ordinances are not so definite that the entire four story building must comply with the requirements for a new building devoted "wholly" to class VIII (school) purposes.

In the present case the first floor devoted to class I purposes will be of slow-burning construction and in a class I building a building up to seven stories in height may be built of slow-burning construction. The second, third and top floors will be built also of slow-burning construction and a building used wholly for class VIII purposes of three stories in height may be built of slow-burning construction.

In view of the fact therefore that the ordinance on this point is not altogether clear, and that the existing structure is surrounded on three sides by alleys and on the fourth side fronts on a public street, and that in addition to two present

fire escapes on the sides of the structure there will be installed two fireproof stairways from the top story of the building to the ground, and in view of the fact that only about 50 per cent of the upper three stories will be used for class rooms and that the students will be all adults, we think that the permit requested might properly be issued.

Very truly yours,

WILLIAM L. SULLIVAN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Frontage Consents for Proposed Hospital.

June 10, 1926.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.

Dear Sir:

This will acknowledge the receipt of your letter of June 8th enclosing a communication from Mr. S. L. Golan, and requesting the views of this department.

The facts are, as we understand them, that application is to be made for a license for a hospital to be located at 669 Irving Park boulevard; that on Irving Park boulevard immediately adjoining the proposed hospital on the west is some vacant land; that this vacant land lies between the proposed hospital and Pine Grove avenue; that the title of this vacant land is in a different individual than is the title to the property upon which the proposed hospital is to be located; that there are no entrances to or exits from the proposed hospital on Pine Grove avenue.

You wish to be advised whether under such conditions frontage consents for the proposed hospital should be obtained from the property owners on Pine Grove avenue, which is a residential street.

Under the state of facts given, we know of no theory upon which frontage consents may be required on Pine Grove avenue, notwithstanding its residential character or its nearness to the proposed hospital.

Section 479 of The Chicago Municipal Code of 1922 provides that, "It shall be unlawful for any person, firm or corporation to build, construct, maintain, conduct or manage any hospital in any block in which two-thirds of the buildings fronting on both sides of the street or streets on which the proposed hospital may front are devoted to exclusive residence purposes, unless the owners of a majority of the frontage in such block, and the owners of a majority of the frontage on the opposite side or sides of the street or streets on which said building fronts and faces consent in writing to the building, constructing, or maintaining, managing or conducting of any such hospital in said block."

To secure a license, the hospital ordinance does not require frontage consents from a majority of all the property owners according to frontage on both sides of the streets surrounding the block in which the hospital is to be located.

The word "block" as used in the above ordinance does not mean a "square" but is defined in Section 920 which reads as follows:

"920. *Definition of word "block."*) Whenever a provision is made in this chapter that frontage consents shall be obtained for the erection, construction, alteration, enlargement or maintenance of any building or structure in any block, the word 'block,' so used, shall not be held to mean a square, but shall be held to embrace only that part of a street bounding the square which lies between the two nearest intersecting streets, one on either side of the point at which such building or structure is to be erected, constructed, altered, enlarged

or maintained, unless it shall be otherwise specifically provided."

The proposed hospital building does not front or face or extend on Pine Grove avenue but is separated therefrom by vacant land which is owned by a different party.

In view of the above, therefore, it is our opinion that, in so far as any matter in reference thereto has been called to our attention, frontage consents for the proposed hospital are not required on Pine Grove avenue.

Very truly yours,

WILLIAM L. SULLIVAN,

Approved :

Assistant Corporation Counsel.

LEON HORNSTEIN,

Acting Corporation Counsel.

Issuance of Duplicates for Lost Bonds.

June 11, 1926.

HON. MARTIN J. O'BRIEN, Comptroller.

Dear Sir :

Your inquiry, whether an indemnifying bond given to protect payment of lost bonds could be made to protect semi-annual interest payments on bonds not due, to which you attach a list of such bonds, has been referred to me, and I beg to inform you of the advice given by Mr. Leon Hornstein, First Assistant Corporation Counsel, to Messrs. Fairbank, Klein, Koral & Adams, 1909-12 City Hall Square Building, Chicago, Illinois, by letter of April 6th, ult., upon the subject of all or a part of the bonds listed by the Prudential State Savings Bank. We quote from the letter the following :

"We have your letter of recent date. * * * You state that you would like to make some arrangement for duplicate bonds to be issued, and that you would like to

take the matter up with the writer at his convenience. * * *

If we adopted our usual course of compelling the owner of a lost bond to prove up under Section 14 of the Negotiable Instrument Act, it would mean many suits extending over all this period.

It was suggested at the time we had the conference with the party mentioned that if you gave the comptroller an indemnity bond covering the various missing bonds, and in double the amount of the face of the bond in each instance, we might make an exception of this matter and recommend to the comptroller the issuance of duplicate instruments.

We believe it would be better to have separate bonds for each of the issues, putting into each bond only such as belong to the particular issue. In this way, as the bonds mature and are all paid the record could be closed up. However, this detail can be disposed of when your representative comes in response to this letter.

We observe that there are nine issues of the City of Chicago in the list that you have presented. Of course, we have nothing to do with Sanitary District or Cook County bonds. Any arrangements which we make will be only tentative unless acquiesced in by the City Comptroller, who will have to take the responsibility, and, therefore, must be satisfied that he is amply protected."

The bond will be for the amount of the lost bond and unpaid interest, and where the bonds are to remain in force for a long time, the surety should be an accredited surety company.

We advise also that copies of the lost bonds and interest coupons be made and notations made thereon showing them to be duplicates issued in place of the lost originals. If at any time the originals should be presented payment can be stopped on either the originals or the duplicates or both as would be just in the case.

Yours very truly,

CORA B. HIRTZEL,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Limitations on Debt-Incurring Power of the City.

June 12, 1926.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

When we received the printed opinion of the Supreme Court in the case of *Wade v. East Side Levee District*, 320 Ill. 396, finally decided on April 9, 1926, there appeared to be so much of importance concerning the computation to be made in order to ascertain the limitation on the City's *debt-incurring power* that we forwarded the opinion to you and called your attention to it specifically. In reply to our communication you wrote to us under date of May 21, 1926, asking a series of questions relating to the interpretation of this recent decision.

Your letter stated that ever since the decision of the Supreme Court in the case of *Stone v. City of Chicago*, 207 Ill. 492, your department had adhered strictly to the formula or schedule set forth therein as a guide. You further indicated that you looked upon the various items presented in that schedule as the only ones to be considered in determining what should be included as "indebtedness" in the sense the term is employed in the constitutional limitation, and that you regarded this schedule as being in very definite form. You now find that the opinion in the *Wade* case makes it important for you to bring up the questions that you ask in order to have them passed upon by the law department so that you may know whether you are proceeding correctly.

The *Stone* case did not purport to give a definite schedule which included all the various items that should be considered in computing the City's debt. What happened in that case was that on the trial the City introduced an exhibit which was headed "Statement of all debts of City of Chicago,

September 30, 1903." This was all that was before the Supreme Court. It did not include some items that should have been given in a summary that was supposed to be a statement of all debts.

The court in concluding its analyses of the various items mentioned in this exhibit said that "the following items found in said exhibit in a constitutional sense constitute the debts of the City and must be taken into account in determining its debt limit: (then followed the schedule.)" It will thus be seen that the court, in presenting this schedule, confined itself to the items found in the exhibit, and the schedule should not have been taken quite so literally or regarded as a complete list to the exclusion of all other items.

We answer the questions you ask in the order that you have presented them, as follows:

1. You first inquire whether you would not be justified in omitting from the list of debts the accrued interest on bonds which you now include in the computations that you make from month to month.

In our opinion such accrued interest need not be taken into account. This at first blush seems to be directly opposite to what was decided in the *Stone* case, where it was stated (Page 510) that Item VII represents the floating indebtedness of the City, but that the money with which to pay the same with the exception of the item of "accrued interest (corporate)" was in the city treasury. The court said of this that the item of "accrued interest" is a debt, but that the other items representing floating indebtedness, which were specified as bonds and coupons matured, covered by deposit for payment, unpaid payrolls covered by funds with city paymaster, amount due trust and special deposit funds covered by cash with the treasurer, outstanding warrants on the city treasurer covered by cash, and the amount due pension fund covered by cash in treasury, "are not debts of the City within the constitutional limitation."

Although, as we have just stated, the new opinion appears to be contrary to the *Stone* decision in this respect, yet

when we consider that this item was actually given in the debt statement by the City as "accrued interest (corporate)," and that the court may have assumed from that expression that it was money that was actually due at the time and should have been paid, we may conclude that the later decision is not actually in conflict with what the court had in mind in the former decision. The gist of the later decision on this point is, that interest on a judgment (being due and payable up to the date of payment on any day when the judgment is paid) constitutes a debt within the constitutional limitation, while interest on bonds (which accrues and is payable only on the first of January and the first of July of each year) does not become a debt until the due date on the coupons arrives and it is actually due.

You ask further, with reference to this point, whether the withdrawal of the amount due from the interest fund and placing it in a special clearing account for the payment of the coupons constitutes a real payment of the debt sufficient to justify its removal from a debt statement. This inquiry is prompted by the fact that the court holds that the cash in the treasury of the municipality and taxes levied cannot be considered as credits or deductions against municipal indebtedness, since the question is not one of insolvency but solely one of indebtedness. We will endeavor to explain our position on this point more fully later on in this opinion, but, for the purposes of the answer to your first question, we will say that it is not necessary to make transfers in the accounts and that without making any shifts you are justified in excluding from the total of indebtedness accrued interest on bonds represented by coupons that have not matured.

2. You ask next, whether you would be justified in omitting the item of accrued interest on tax warrants from the summary of debts in preparing a debt statement.

Our answer to this is practically the same as the answer to your first question. That is to say, you are justified in deducting this interest because it falls due at stated intervals and is paid immediately when due. In its last analysis, it is not

an incurred liability but amounts to a decrease in the prospective revenue. The court, in passing on interest on bonded indebtedness, cites the case of *Goodwine v. County of Vermilion*, 271 Ill. 126, where it was held that interest on bonds about to be issued should not be counted as a debt, and said that "interest is not a debt within the meaning of the constitution until it is earned and becomes due." The same rule must necessarily apply to interest on tax anticipation warrants as to interest on bonds.

3. Your third question is whether, when you issue a statement of the City's debt, you should include the accrued interest up to date on all judgments outstanding. We have already answered this. Such interest on judgments should be included as a part of the City's debt. You further ask, in this connection, whether warrants issued for the payment of either or both principal and interest on judgments which have not yet been delivered to the payee or presented by the payee to the treasurer should be considered as an offset to the debt. We believe you would be justified in so considering warrants that have actually been drawn and are ready for delivery and have been delivered, if the money to pay the same is in the treasury. While the court says that the cash in the treasury of a municipality cannot be regarded as reducing a debt until it is paid out, we do not believe that it implies by that language that it is still in the treasury for purposes of this computation when warrants have been drawn against it.

4. You next ask whether you would be justified in applying taxes in course of collection or cash received thereon as an offset to the City's debt. On this point the court expressly says that the taxes in course of collection cannot be regarded as an offset. It quotes on the question of applying cash in the treasury and taxes levied as a credit or deduction against municipal indebtedness the following from the case of *City of Chicago v. McDonald*, 176 Ill. 404 (Page 415):

"Upon what principle it is contended that an outstanding debt is not a debt by reason of some cash in the public treasury it is difficult to perceive. As long as the cash is not applied to the payment of the debt the debt

must remain. Nor can it be perceived upon what principle uncollected taxes in course of collection can be held to reduce the floating debt until they are actually collected and applied to its reduction. * * * The question is not one of insolvency but solely one of indebtedness."

5. Your fifth question relates to liability on leases.

You state that you have never placed on your records the liability of the City for a lease of premises as a part of the constitutional debt, although you were at one time advised that a certain lease had to be so treated. The court refers to the decision of *Evans v. Holman*, 244 Ill. 596, and says that under the rule laid down in that case rental under an unexpired lease was properly included in reckoning the municipal indebtedness. The case referred to held that an agreement by a municipality to pay annually a certain price per light for a specified number of street lights for a period of thirty years constitutes an indebtedness for the whole amount. There has been some doubt with respect to items of that character, but, so far as leases of premises are concerned, we do not believe that there ever was much doubt but that they must be included as debts.

6. You ask whether the liability of the City under contracts entered into is a part of the constitutional indebtedness, and you say in this connection that the aggregate of contract obligations is approximately six million dollars, of which about two million five hundred thousand dollars are chargeable to bond funds.

Obligations under contracts are a part of the indebtedness of the City and must be included. We do not believe, however, that the court will require the City to include as a debt an obligation that must be met out of bonds that are already scheduled as a part of the debt of the City. In other words, while the language of the court, not only in the *Wade* case, but in a number of other cases, has been very emphatic on the point that contract obligations are debts and no money in the treasury can be regarded as a set-off to same, it is not

to be presumed that the court will require you to schedule both the obligation to pay under the contract and the obligation to pay for the money realized or to be realized from bonds that is to be applied to this purpose.

You further ask, in this connection, whether the question of appropriations having been made or not having been made for said obligations is a factor in determining whether or not liability under contracts, leases, etc. are debts. We do not believe that the making of an appropriation in itself constitutes the incurring of a debt. Nevertheless, authority is given by the appropriation to make contracts which must be regarded as debts as soon as they are properly approved. There is much to be said on the point that where appropriations are made for current expenses said expenses stand on a somewhat different footing from regular contract obligations, and there may have to be some further consideration of the question whether a current expense accruing by reason of a contract is within that category. At present, however, we cannot do otherwise than treat all contract obligations as debts.

7. Your seventh question relates to the schedule in the *Stone* decision classing outstanding warrants drawn on the Water Fund as a part of the debt. You call attention to the fact that the *Stone* schedule omits entirely any liability for outstanding and unpaid warrants against the corporate fund. There seems to be an inconsistency about this which can only be explained on the theory that the court, in passing on the schedule presented in the *Stone* case, assumed that the item of outstanding warrants drawn against the Water Fund must be a debt, because it was placed under the heading, "Water fund debt." The court, in that case, expressly held that the item of "Warrants on City Treasurer outstanding" amounting to \$512,722.90 was not a debt within the constitutional limitation. The Water Fund item was worded "Outstanding warrants on Treasurer and deposits," and being placed under the heading "Water Fund debt" and along with such obligations as water certificates, accrued interest, etc., it was, no doubt, looked upon as being scheduled without any offset thereto in the way of cash.

The above answers cover the seven specific questions that you have asked. In addition to these, you bring up the question of unissued bonds. We have gone into that question in opinions heretofore rendered which we do not think are affected by the recent decision. We refer, among others to an opinion rendered to the chairman of the finance committee on July 21, 1919, appearing on page 855 of Opinions of the Corporation Counsel from July 1, 1916, to December 31, 1919.

We believe, therefore, that we have stated our position with respect to all the different points that you have raised.

Yours truly,

LEON HORNSTEIN,

First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Permit for Store Buildings Under Elevated Railroad Structure.

June 14, 1926.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

Replying to your communication of the 11th instant, concerning the issuance of permits to the Algot B. Larson Company, builders, for the construction of certain store buildings at 6322 South Halsted street, 944-948 Belmont avenue, 3939-3941 Sheridan road, and 1715-1717 West Chicago avenue, on the rights-of-way of the Chicago Rapid Transit Company under the elevated railroad structures of that company, we beg to submit the following opinion and report.

Numbers 3939-3941 Sheridan road and 944-948 Belmont avenue are on the right-of-way of the main line of the North

Side Division of the elevated railroad system, which main line was authorized to be constructed and is maintained under an ordinance granted to the Northwestern Elevated Railroad Company on January 8, 1894, and accepted by that company on January 15, 1894; numbers 1715-1717 West Chicago avenue are on the right-of-way of the Logan Square Branch of the Metropolitan Division of the elevated railroad system, which branch was authorized and maintained under an ordinance granted to the Metropolitan West Side Elevated Railroad Company on April 7, 1892, and accepted by that company on April 16, 1892; number 6322 South Halsted street is on the right-of-way of the Englewood Branch of the South Side Division of the elevated railroad system, which branch was authorized and is maintained under a grant to the Englewood Elevated Railroad Company contained in Section 17 of an ordinance passed March 16, 1903, and accepted by the Englewood Elevated Railroad Company on May 18, 1903. The Chicago Rapid Transit Company succeeds to the rights granted by the aforesaid ordinances as a corporation formed by the consolidation of said Northwestern Elevated Railroad Company, the Metropolitan West Side Elevated Railway Company, which company in 1898 succeeded to the rights of the Metropolitan West Side Elevated Railroad Company, and the South Side Elevated Railroad Company, which company was consolidated with the Englewood Elevated Railroad Company in 1906.

Section 16 of said ordinance of January 8, 1894, to the Northwestern Elevated Railroad Company, contained *inter alia* the following provision:

“The space and the surface of the ground under said railroad, beneath girders and between columns, so far as the same is not occupied by said railroad company, shall by said company be kept at all times free from all obstructions and in a clean and wholesome condition, to the approval and satisfaction of the department of health or health officers of said city; * * *”

The same provision is contained in Section 16 of the aforesaid ordinance of April 7, 1892, to the Metropolitan West

Side Elevated Railroad Company, and in said Section 17 of the ordinance of March 16, 1903, granting rights to the Englewood Elevated Railroad Company, and also in many other ordinances authorizing the construction and maintenance of different divisions of the elevated railroad system not affected by the four locations referred to in your letter.

Upon acceptance of the aforesaid ordinances by the grantee companies the provisions quoted became binding contracts restricting the use of the rights-of-way of the companies to railroad purposes and said provisions have been the basis of opinions by this office heretofore rendered to the effect that no permits should be issued to the elevated railroad companies or their lessees for the construction of buildings on said railroad rights-of-way for other than railroad purposes. We have been unable to find any other legal restriction upon the elevated railroad companies in respect to using available space on private rights-of-way under elevated railroad structures for commercial purposes, provided, of course, such commercial uses should be in compliance with the general building ordinances of the City and should not interfere with the use of the elevated railroads for transportation purposes. The restrictions contained in the aforesaid ordinances being contractual could, of course, be relaxed or rescinded at any time by mutual consent of the City and the company or companies owning or operating the elevated railroad system.

The evident purpose of the ordinance passed July 22, 1925, which ordinance was accepted by the Chicago Rapid Transit Company on August 13, 1925, was to supplement the aforesaid elevated railroad ordinances and many others containing similar restrictions by expressing the mutual desire of the City and the Company to rescind the restrictions in the provisions quoted and to permit the Chicago Rapid Transit Company or persons authorized by it to use available space on the private rights-of-way of said company for commercial purposes, provided, of course, that any buildings constructed upon said rights-of-way should comply with the terms and

provisions of the Building Code of the City and should not interfere with the use of the elevated railroad structures for railroad purposes. Section 1 of said ordinance of July 22, 1925, reads as follows:

“Anything in any ordinance of the City of Chicago to the contrary notwithstanding, consent and permission is hereby given to the Chicago Rapid Transit Company, its successors and assigns, to erect and maintain or to grant to others by way of lease, or otherwise, the right to erect and maintain buildings for business and office purposes upon available portions of the rights-of-way now or hereafter owned in fee by said company respectively.”

We are informed that the leases for the use of buildings to be constructed at the four locations named in your letter and the plans for the buildings so to be constructed have been approved by the Illinois Commerce Commission. Under the terms and provisions of the Public Utilities Act of 1921 that commission must determine whether any such uses of railroad rights-of-way will interfere with the use of the railroads for the service of the public in conformity with the purpose for which they were constructed.

Section 2 of the ordinance of July 22, 1925, obligates the company to “indemnify and save harmless the City of Chicago of and from all actions, claims, demands, suits and judgments whatsoever arising out of or resulting from the passage of this ordinance and the erection and maintenance of buildings for business and office purposes as herein permitted.” Upon acceptance of that ordinance by the company said Section 2 became a binding contract, pledging the entire credit of the company as security for the indemnities therein provided for. The ordinance does not provide for the execution and filing of any bond or bonds with the City, as security for the payment of any such claims or indemnities but reliance is placed upon the general obligation of the company so to save the City harmless.

We are, therefore, of the opinion that under the terms and provisions of said ordinance of July 22, 1925, permits for

the construction of the proposed buildings at the aforesaid four locations should be issued, provided the plans for such buildings are in conformity with the ordinances of the City in respect to the construction of buildings for the purposes to which said buildings are to be put. No bond should be required of the company merely on account of the location of said buildings upon railroad rights-of-way but only such bonds should be required as are provided for in the building ordinances of the City of Chicago,

Very truly yours,

C. M. DOTY,
WILLIAM J. TUOHY,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Exhibition of a Person Who Became Conspicuous Through Criminal Act.

June 15, 1926.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

You forwarded to this office a report from the captain of the first district in regard to the exhibition of Mrs. Russell Scott which was to be staged at the Central Theatre, 64 East Van Buren street, and you asked for an opinion as to whether or not the police have the authority to prohibit such an exhibition.

The newspapers have advertised the exhibition of Mrs. Russell Scott, who is the wife of a man convicted of murder and who is under sentence of death. This exhibition was to take place at the Central Theatre, commencing at 1:00 p. m. on June 14. Admission was to be 50 cents.

An officer was sent there and found that there was a building on the stage containing a glass cage which was to contain a cot, and it was announced that Mrs. Scott was to spend her time there fasting, and would be on exhibition to the public.

The captain of the district came to police headquarters to inquire whether such an exhibition could be stopped, but not finding the Superintendent of Police in, he came to this office and made the same inquiry of the writer. We pointed out to him that under the act of the General Assembly approved April 22, 1899, in force July 1, 1899, public exhibitions for pecuniary gain of persons who have become conspicuous through some criminal act were prohibited. In our opinion the statute is sufficient to cover such a case as the one before us.

Acting in pursuance of the advice obtained at this office, the police notified the parties who were staging this exhibition that it could not proceed. Thereupon, attorneys representing the theatre owner filed a bill for injunction in the Circuit Court and undertook to get an injunction Monday afternoon. At our request, the matter was put over until this morning, at which time we filed our answer to the bill of complaint and there was a full hearing on the motion before Judge Friend before the Circuit Court. The judge indicated that he would deny the motion for a temporary injunction, whereupon the attorneys representing the complainant asked leave to dismiss their bill, and such leave was granted.

There is, consequently, no proceeding pending which affects your right to make arrests on account of the exhibition in question if these parties persist in giving it. We suggest that if you take action it should be by arrest and the lodging of complaint rather than the closing of the doors of theatre, since the latter course might involve complications on which a new bill for injunction could be filed.

Yours truly,

LEON HORNSTEIN,

Approved: *First Assistant Corporation Counsel.*

FRANCIS X. BUSCH,

Corporation Counsel.

Compensation for Sub-Sidewalk Space.

June 16, 1926.

HON. LOUIS E. GOSSELIN, Deputy Comptroller.

Dear Sir:

In your communication addressed to the Corporation Counsel requesting an opinion as to the proper disposition to be made by your department of certain accounts on your compensation ledgers you state:

“In the course of bringing accounts of charges for sub-sidewalk and alley space on the Compensation Ledgers up to date, we presented claim for unpaid charges of \$3,963.77 (accrued subsequent to Nov. 1, 1915,—all previous charges having been paid) to Mrs. Flora Wilson, Ashcraft and Ashcraft, attorneys, for sub-sidewalk and alley space adjoining the Old Saratoga Hotel (now New Tremont Hotel premises.”

In response to our communication they wrote in substance as follows:

“At the earnest solicitation of the City, contracts were made with the property owners along this alley by which they were required to pave and keep the alley in good condition, for which they had the privilege of using the alley. The Supreme Court has sustained this contract.

For your further information we attach the letter referred to and all recent correspondence in regard to this claim.

Also, please note that the Saratoga Hotel paid all charges for these privileges from April 1, 1907, to Oct. 31, 1915, and made one payment of \$247.74 for charge of Nov. 1, 1916, to April 30, 1917, on Jan. 29, 1917, notwithstanding the contract referred to in letter of Ashcraft and Ashcraft. We also have in mind that these privileges are located in the School Section Addition.

The contract with the Saratoga Hotel expired April 1, 1917."

The bond of Charles L. Wilson and Andrew Shuman, dated May 6, 1872, recites that the Board of Public Works of the City of Chicago has granted to them permission to excavate for and construct a vault under the alley in rear of Lot 23, Block 142, School Section Addition to Chicago, for use in connection with any building erected or to be erected on Lot 22 and the south sixteen feet of Lot 23, and contains covenants that they will:

1. Indemnify and save harmless the City and its officers from damage by reason of the excavating, construction and maintenance of said vault.

2. Will grade and repair as often as ordered by the common council of the City, etc.

3. Provided that they shall not be subject to any tax or assessment upon the same for rent, beyond what shall be charged for similar vaults.

4. Conform to any ordinance which may now exist or which may hereafter be made by the Common Council or any rules which are now or which may be hereafter adopted by the Board of Public Works relative to similar vaults in alleys.

(See document No. 30067, filed for record May 10, 1872, and recorded in Book 67 of Records, page 440, in the office of the Recorder of Cook County).

In the case of *Gregsten v. City of Chicago*, 145 Ill. 451, a similar situation involved Lot 16, Block 142, School Section Addition to Chicago, wherein the question presented was whether the permit, construed in connection with the bond, so far as it related to matters not affecting the public use of the alley, constituted a contract revocable by the City at will. The court in passing on said question, at page 465, said:

"We are of opinion that the permit and bond, forming parts of the same transaction, constituted a contract between the parties, not revocable by the City, unless public interest or convenience demanded it, or for some other cause for which the contract, by its terms, might be re-

voked. By the terms of the bond the City reserved the right to revoke the permit and re-enter whenever the public interest should require it, and also, upon the failure of Gregsten, his heirs, executors or assigns, to keep and perform the covenants and conditions in the condition of his bond mentioned, and upon the termination of the permit, it was stipulated that Gregsten should remove and fill up the vault, thereby restoring the alley to its former condition.”

No question of compensation to the City for the use of the space below the surface of said alley was involved in the foregoing case.

In the bond executed by Charles L. Wilson and Andrew Shuman (a copy of which is submitted herewith), the condition of the bond is identical with the Gregsten bond, *supra*, except that it relates to Lot 22 and the south sixteen feet of Lot 23, Block 142, School Section Addition to Chicago, and contains, *inter alia*, the following:

“Provided always however that we shall not be subject to any tax or assessment upon the same as rent, beyond what shall be charged for similar vaults.”

On January 29, 1912, an ordinance was passed amending The Code of 1911 relating to the issuance of permits and the payment of compensation for the use of sub-sidewalk space and space under streets and alleys. Section 2309 thereof was amended to read as follows:

“2309. Whenever any party holding a contract or permit for the construction or maintenance of any space, vault or structure, under the sidewalk in any street, alley, or other public place of this City, or for the construction or maintenance of any coal hole, trap-door, or other opening in the sidewalk, which shall have been issued under the terms of any ordinance or Council order heretofore in force, the conditions of which have been and are now being fully complied with, shall apply for a permit hereunder and shall desire to have the permit or contract heretofore entered into under such ordinance heretofore in force cancelled, the Commissioner of Public Works

shall cancel the same as regards any liability thereunder arising after the date of the issuance of the new permit hereunder, but such contract or permit and the bond given therewith shall remain in full force and effect as to all rights and liabilities accruing under the same, including all amounts due the City of Chicago for fees or compensation under the same, up to the time of said cancellation, otherwise such contracts and permits shall remain in full force and effect." (See Council Journal, pages 2678-2680).

The ordinance of January 29, 1912, was amended several times, but the section above quoted has never been amended or repealed, except in so far as it was remodeled to fit into The Chicago Municipal Code of 1922, where it appears with slight modification as Section 3585.

By reason of the permit and bond hereinbefore referred to, I am of the opinion that the heirs, executors, administrators and assigns of Charles L. Wilson and Andrew Shuman are liable for the compensation due the City for the use of the space under the surface of the above described alley; such compensation, however, not to exceed the charge made for similar space to others.

I return all correspondence herewith.

Respectfully submitted,

ROY S. GASKILL,

Assistant Corporation Counsel.

Concurred in:

W. ARNOLD AMBERG,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Respective Rights and Duties of Commissioner of Public Works and Board of Local Improvements.

June 19, 1926.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

Your communication addressed to the Corporation Counsel requesting an opinion as to just what rights the Department of Public Works should exercise under the statute which created the Board of Local Improvements and under which that body operates, has been referred to the undersigned for consideration and reply.

In and by a certain act of the legislature entitled, "An Act concerning local improvements," in force July 1, 1897 (Chap. 24, Sec. 122, Callaghan's Illinois Statutes Annotated), it is provided by Section 2 thereof, as amended, in part as follows:

"In cities in this state having a population of fifty thousand (50,000) or more, by the last preceding census of the United States, or of this state, there shall be appointed and designated, in the manner provided by law, or if no such method be provided, then by appointment of the mayor, a commissioner of public works, a superintendent of streets, a superintendent of special assessments, a superintendent of sewers, and a city engineer; * * *."

Section 6 of the foregoing act, as amended in 1901, 1908, 1913, 1915, and 1923, provides in part as follows:

"In cities within the terms of this Act, having a population of one hundred thousand (100,000), or more, by the last preceding census of the United States, or of this state, there is hereby created a board of local improvements consisting of the superintendent of special assessments and five other members; such five members shall be

nominated by the mayor and shall be confirmed by the council or board of trustees of such city; and no one of which, except such superintendent of special assessments, shall be the head of any department of the government of such city, or hold any other office or position therein. Said board shall elect from its members a president, a vice-president, and an assistant secretary. The superintendent of special assessments shall be *ex officio* secretary of the board. In the absence or the inability of the president or secretary to act, the vice-president for the president and the assistant secretary for the secretary are hereby given full power to sign and execute contracts, vouchers, bonds, pay rolls and all other papers, documents and instruments necessary to carry this act and all proceedings hereunder in full force and effect * * *."

Section 7 of the foregoing act provides, in part, as follows:

"All ordinances for local improvements to be paid for wholly or in part by special assessment or special taxation shall originate with the board of local improvements. * * * Said board shall have the power to originate a scheme for any local improvement, to be paid for by special assessment or special tax, either with or without a petitioner, and in either case shall adopt a resolution describing the proposed improvement, which resolution shall be at once transcribed into the records of the board."

All ordinances for improvements to be paid for wholly or in part by special assessment or special taxation must originate with the Board of Local Improvements (*Walker v. City of Chicago*, 202 Ill. 531).

All improvements must originate with Board of Local Improvements (*City of Chicago v. Huleatt*, 276 Ill. 466).

It is the province of the Board of Local Improvements to determine material, and nature, character and kind of improvement (*City of Chicago v. Huleatt*, 276 Ill. 466).

No power is conferred upon the City Council to direct, by resolution or otherwise, the Board to originate an improvement, or to prepare and present an ordinance for a local im-

provement (*Walker v. City of Chicago*, 205 Ill. 531). Majority action controls board (*Gage v. City of Chicago*, 192 Ill. 586).

When Board of Local Improvements considers that work does not comply with contract, it is required to certify the question to the court making assessment for determination (*Price v. Board of Local Improvements*, 262 Ill. 299, confirming 187 Ill. App. 629).

The Department of Public Works of the City of Chicago was created by ordinance passed by the City Council, which appears in The Chicago Municipal Code of 1922 as Section 3203, which provides as follows:

“There is hereby established an executive department of the municipal government of the City which shall be known as the department of public works. The said department shall embrace the commissioner of public works, the deputy commissioner of public works and such other officers and employees as are herein designated, and such as the City Council may hereafter by ordinance provide. The said department of public works shall include the bureau of engineering, the bureau of streets, the bureau of water, the bureau of sewers, the bureau of maps and plats, the bureau of compensation, the bureau of waste disposal, the bureau of municipal pier, the bureau of parks, playgrounds and bathing beaches, and the bureau of architecture and city hall.”

Section 3204 of said code provides:

“All officers and employees of the above mentioned bureaus shall be under the direction and supervision of the commissioner of public works, and shall perform such duties as may be required of them by said commissioner or by the ordinances of the City.”

Section 3206 of said ordinance creates the office of Commissioner of Public Works, and Section 3211 defines the powers of said commissioner as follows:

“Said commissioner shall have charge of all public improvements commenced, or to be commenced, by the City, and shall have power, subject to the ordinances of the City, to regulate and control the manner of using the

streets, alleys, highways and public places of the City for the erection of telegraph poles, or other poles or posts, for the laying down of gas, water or steam pipes, sewers, conduits and other underground construction authorized by law, or the ordinances of the City, and to determine the location thereof, and shall have authority to cause the prompt repair of the streets, alleys, highways and public places whenever the same are taken up or altered; provided, *that nothing herein contained shall be construed as relating to the construction of local improvements paid for in whole or in part by special assessment, but said commissioner shall have charge of all such local improvements paid for in whole or in part by special assessment upon their completion and acceptance by the board of local improvements, or upon their completion, acceptance and approval by the court confirming the assessment, and said commissioner shall have power to enforce all provisions of any contract for such improvements which relate to the guaranty and maintenance of such improvements and the repairs thereto.*" (Italics are ours).

By reason of the foregoing, I am of the opinion, first : that the burden of supervising and superintending the installation of public improvements is on the Board of Local Improvements and that it is the duty of said Board to see that the contracts and specifications relating to improvements are complied with by the contractors constructing the same; second: that upon the completion of a local improvement and its acceptance by the Board of Local Improvements the subsequent maintenance thereof is under the jurisdiction of the Commissioner of Public Works.

While nothing in the law requires intimate cooperation between the Board of Local Improvements and the Department of Public Works, it would seem almost obvious and highly desirable that such cooperation should exist. The passage of a resolution or order by the City Council might be construed as an unauthorized attempt on the part of the City Council to amplify the State statutes, and we would suggest that the matter be taken up with the Chairman of the City Council Committee on Local Industries, Streets and Alleys,

and if agreeable to that committee that a rule be passed by the committee requiring that local improvement ordinances should be approved by the Commissioner of Public Works before being recommended by that committee for passage by the City Council.

Respectfully submitted,

ROY S. GASKILL,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Day Nursery on 20th and 21st Floors of Building.

June 21, 1926.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.

Dear Sir:

This will acknowledge receipt of your letter of June 18th regarding the operation of a day nursery on the 20th and 21st floors of the New Medical Arts Building now in course of construction at the corner of Wabash avenue and Lake street. You wish to be advised whether or not the 20th and 21st floors of this building may be used for a day nursery, the space to be provided accomodating 700 children per day.

There is nothing in the City ordinances expressly prohibiting the maintenance of a day nursery on any particular floor or floors of a building, but there is, however, a discretion vested in the Commissioner of Health relative to the location of such an institution by Section 1891 of The Chicago Municipal Code of 1922, which reads as follows:

“1891. *Inquiry—character—permit.*) It shall be the duty of the commissioner of health, when such ap-

plication is made, to make or cause to be made a strict inquiry of the statements therein contained and a thorough inspection of the premises proposed to be used for a day nursery. *If he shall find that the day nursery is suitably and properly located*, that it will afford proper and adequate accommodations for the children to be received therein, that the applicant is making the application in good faith for the care and betterment of children and is a suitable person, firm, association or corporation for that purpose, that the superintendent or person to be in charge thereof is of good moral character and has sufficient knowledge, experience and ability properly to conduct, manage and maintain such day nursery, and that such place and such day nursery complies in all respects with the requirements hereinafter set forth, then the commissioner of health shall issue, or cause to be issued, a permit authorizing such applicant to open and conduct a day nursery at the place specified, which permit shall state the maximum number of children that may be cared for at one time. The fee to be paid annually to the city collector for such day nursery permit shall be one dollar. Every permit issued hereunder shall expire on the thirty-first day of December of the year in which it is issued. No permit shall be issued for a second or succeeding period except upon and after a reinspection of the premises and in the manner herein provided."

The above section makes it your duty, when application is made for a permit for a day nursery, to determine the suitability and propriety of the proposed location and whether "it will afford proper and adequate accommodations for the children to be received therein."

The plain purpose of these provisions was to place upon the Commissioner of Health the responsibility of deciding, in the interest of safeguarding the health and well-being of the children, the propriety of the location of day nurseries. To determine this question, in our opinion, you should among other things take into consideration whether the proposed location would be harmful or dangerous to the children by reason of smoke, noise, fumes, odors, vibrations, soot, sudden fire or explosion or any other cause either from within

the building in which the proposed nursery is to be located or from buildings or uses in the immediate vicinity.

You should also take into consideration the conditions and surroundings of the proposed location in the matter of street congestion as well as the problem, because of its particular location, of there being suitable egress for the children from the proposed nursery in case of catastrophe of any kind.

After weighing the above considerations, and any others that may properly occur to you by reason of your experience in such matters, it then becomes your province to determine whether the proposed location is a suitable one for the day nursery in question by the reasonable exercise of that discretion vested in you by the ordinances.

Very truly yours,

WILLIAM L. SULLIVAN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Salary of Member of National Guard Called for Temporary Active Duty.

June 28, 1926.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.

Dear Sir:

We have your communication of the 23d instant, in which you inquire whether or not one of the employees in your department who is a member of the Illinois National Guard, having been called for special duty in connection with the recent Eucharistic Congress, can receive his regular pay during such absence under the provisions of an order passed by the City Council on February 24, 1926, Council Journal, p. 2634.

Said order reads as follows:

“Ordered, That all employees of the City of Chicago who are members of the Illinois National Guard, United States Naval Reserve Force or Organized Reserve Corps, be granted a leave of absence, with pay, for the periods they serve at the Annual Encampment, Cruise of Instruction or on temporary active duty.”

It is to be noted that the last clause thereof, reading: *“or on temporary active duty,”* which is the classification of service rendered by the guardsman, is covered by the order and no other interpretation can be placed thereon.

It is our opinion, therefore, that the employee who absented himself from his customary duties to fulfill an official order of the military company need suffer no deduction from his regular pay on that account.

Very truly yours,

JAY A. SCHILLER,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Pension Rights of Widow of Deceased Police Dog Catcher.

June 29, 1926.

RETIREMENT BOARD, POLICEMEN'S ANNUITY & BENEFIT FUND.

Gentlemen:

Replying to your letter of June 17th requesting an opinion as to the pension rights of the widow of a deceased police dog catcher, the following is submitted:

Your letter states that Mrs. Mamie McCormick is the widow of Thomas McCormick, a former member of the Police Department, now deceased; that the deceased was born December 14, 1866, and served 4 months and 6 days as temporary driver in 1897; served 5 months as dog catcher in 1903; was appointed probationary dog catcher March 7, 1904; was appointed regular dog catcher September 7, 1904; and died November 9, 1915; that examination of the records indicates that Thomas McCormick was sworn in at the time of his appointment in 1897 and at the time of his appointment in 1904, but fails to show whether or not he was sworn in in 1903.

I.

The first question to decide is whether or not a police dog catcher was or is a member of the Police Department of the City of Chicago so as to entitle him or his widow to share as a beneficiary of the police pension fund.

In opinion No. 1424, dated April 21, 1926, it was held that a police dog catcher is a "policeman" and entitled to the benefits of the Police Pension Fund Act, the basis for such holding being the decision of the Supreme Court of the State of Illinois rendered in the case of *People v. Foreman*, 296 Ill. 487. Moreover, according to your letter, the records of the Police Department show that Thomas McCormick was sworn into the service as a member of the Police Department in 1897 and again in 1904. If there was any doubt as to the status of Thomas McCormick as a member of the Police Department, the question is settled by the fact that the Police Pension Fund Act of 1915 was the governing Act at the time of the death of Thomas McCormick, and the Police Pension Fund Act of 1915 was amended in 1921 so as to include a police dog catcher within the definition of the word "policeman."

Thomas McCormick, having therefore been a member of the Police Department, his widow would consequently become entitled to a pension, if she came within the provisions of the Police Pension Fund Act relating to pensions to widows of policemen.

I understand that Mr. McCormick was not himself a pensioner at the time of his death, so the rights of his widow are not dependent upon his right to or award of any pension.

II.

Thomas McCormick having died on November 9, 1915, the rights of his widow to a pension would be governed by the provisions of the Pension Fund Act approved June 29, 1915.

The Pension Fund Act of 1915, in Section 5 thereof, provides a pension for the widow of a policeman in 3 classes of cases, viz:

(a) When any policeman loses his life as a result of the performance of police duty.

(b) Whenever any policeman shall die after 10 years in the service and while still in the service of the City as a policeman.

(c) Whenever a policeman shall, after 10 years service and while still in the service of the City, be legally adjudged insane.

III.

Thomas McCormick, having served as a member of the Police Department for more than 10 years prior to his death, I am of the opinion that his widow, upon his death, became entitled to a pension only in the event that he died in consequence of the performance of police duty or that he died while still in the service of the City of Chicago as a member of the Police Department. If Thomas McCormick did not die in consequence of the performance of police duty, or did not die while still in the service of the City of Chicago as a member of the Police Department, then I am of the opinion that his widow is not entitled to a pension.

Respectfully submitted,

GEORGE F. MULLIGAN,

Approved:

Assistant Corporation Counsel.

FRANCIS X. BUSCH,

Corporation Counsel.

**Power of Public Library Employees' Pension Board to
Increase the Amount of the Pension Paid to Pen-
sioners Who Retired Prior to July 1, 1923.**

June 29, 1926.

MR. HARRY G. WILSON, Secretary, Chicago Public Library.

Dear Sir :

Replying to your letter of June 23, 1926, for an opinion as to the power of a Public Library Employees' Pension Board in cities having a population exceeding 100,000 inhabitants to increase the amount of the pension paid to pensioners who retired from the service of the library and were granted pensions prior to July 1, 1923, the following is submitted :

I .

The Library Employees' Pension Fund Act, applicable in cities having a population exceeding 100,000 inhabitants, approved May 12, 1905, as subsequently amended, provides in Section 6 thereof that the Board of Trustees of a Library Employees' Pension Fund shall have the power, and it shall be its duty (Section 5), to determine the amount to be paid as pensions or annuities under this act and to increase or reduce the same in its discretion ; provided, that no benefit or annuity shall exceed \$900 per year. The Library Employees' Pension Fund Act does not include any schedule of pension payments, but apparently leaves the amount of the pension award to be fixed by the Pension Board administering the fund, excepting that the sum of \$2.50 per month is directed to be added to any pension award for each full year of service after 20 years of service, and excepting that no pension shall be in excess of \$75 per month or \$900 per year.

II.

The by-laws and rules of the Board of Trustees of the Public Library Employees' Pension Fund of the City of Chicago, in Article 5 of the rules, provides a schedule of pension awards based upon maximum salary. This, however, is only a rule or regulation of the Board, and Article 15 of the by-laws provides that the by-laws or rules of the Board, or any of them, may be altered or amended at any regular or special meeting in the manner provided in said Article 15. This, however, relates solely to the original grant of pension and does not affect the subsequent increase or decrease of a prior pension grant.

As the statutory enactment creating the Library Employees' Pension Fund establishes no fixed pension awards, but specifically gives to the Board of Trustees administering the fund the power and duty to increase or reduce benefits or annuities in its discretion, I am of the opinion that the Board of Trustees of the Public Library Employees' Pension Fund has the power to increase the amount of the pension paid to pensioners who retired from the service of the Library without regard to the date when such pension was granted.

III.

Prior to July 1, 1923, Section 5 of the Public Library Employees' Pension Fund Act limited the maximum pension to \$600 per year. By the amendment to the act approved June 21, 1923, in force July 1, 1923, the maximum amount of pension that could be paid was increased to \$900.

Does this increased maximum pension apply in the case of a pensioner who retired from the service of the library and was granted a pension prior to July 1, 1923?

A similar question came before the Police Pension Board of the City of Rock Island last year, was submitted to court, and in December, 1925, the Appellate Court for the Second District of Illinois (in the case of *Phoebe Miner v. Stafford et*

al., members of Board of Trustees of Police Pension Fund of Rock Island, Illinois), in passing on the question as to whether or not the increasing of the limitation of pension award applied only to widows of policemen whose death occurred subsequent to the passage of the amendment increasing such limitations or whether it also removed the limitation of pensions of widows of policemen who were killed prior to the passage of the amendment, used the following language:

“In order to determine the question involved it must be remembered that a pension is a bounty, springing from the graciousness and appreciation of sovereignty. It may be given or withheld at the pleasure of a sovereign power, * * * and the amount of the future installments is to be determined by the sovereign in the future who can either be liberal or penurious, who can add to or diminish or take away entirely at its pleasure.

“Section 2 of Chapter 131, entitled ‘Statutes,’ provides that:

“ ‘The provisions of any statute, so far as they are the same as those of any prior statute, shall be construed as a continuation of such prior provisions and not as a new amendment.’ * * * If this be true, then since 1923 the only limitation upon petitioner’s right to a pension equal to one-half of her deceased husband’s salary is the limitation contained in the amendment of \$1,250 per year (in the instant case \$900 per year) which repeals the limitation of \$600 per year contained in the old Act. * * * The amendment was simply to remove the limitation imposed by the Act in force when her husband lost his life (in the instant case when the pensioner retired). * * * By removing the limitation imposed in the Act of 1909, by substituting the new and larger limitation in the Act of 1923, the effect was to automatically raise her pension. * * * This does not require any retrospective construction to be given to the amended statute. * * * The pension was to continue in the future and manifestly the future amount was to be determined by the future Acts of the General Assembly in relation thereto. If the Legislature increased the amount then this affected only the remedy, and the new Act would apply, without regard to whether the right to the pension accrued before or after the change in the law.”

The court held that the effect of an amendment to a pension act which merely changed the limitation of maximum pension to be paid is to re-enact the old law without the restriction therein contained.

I V .

In Endlich on Interpretation of Statutes, Sec. 294, the rule is stated as follows:

“A statute which is amended is thereafter, as to all acts subsequently done, to be construed as if the amendment had always been there, and the amendment itself so thoroughly becomes a part of the original statute that it must be construed in view of the original statute as it stands if the amendments are introduced and the matters superseded by the amendments are eliminated.”

In Black on Interpretation of Laws, Sec. 131, the following rule is announced:

“An amendment of a statute by a subsequent act operates precisely as if the subject matter of the amendment had been incorporated in the prior act at the time of its adoption, so far as regards any action had after the amendment is made, for it must be remembered that an amendment becomes a part of the original act, whether it be to change a word, figure, line or entire section, or a recasting of the whole language.”

As the Board of Trustees of the Public Library Employees' Pension Fund has the power to increase pensions in its discretion, such increase should be made as though the limitation of \$900 had always been the limitation and precisely as if the subject-matter of the amendment of 1923, that is the limitation of \$900, had been incorporated in the original Act at the time of its adoption, instead of the limitation of \$600.

V .

I am of the opinion that the Amendatory Act of 1923 changing the maximum amount of pension to be paid from

\$600 per year to \$900 per year applies to pensioners who retired from the service of the library and were granted pensions prior to July 1, 1923, as well as to employees who retired from the service of the library or might retire subsequent to July 1, 1923.

Respectfully submitted,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Right of Uxoricide to Refund of Contributions for Widow's Annuity, and to Annuity.

June 29, 1926.

RETIREMENT BOARD, POLICEMEN'S ANNUITY & BENEFIT FUND.

Gentlemen:

Replying to your letter of June 21, 1926, requesting an opinion as to the right of an uxoricide policeman to be refunded the contributions made by him for widow's annuity purposes, the following is submitted:

Your letter states that Sergeant William T. Russell killed his wife in August, 1925, was suspended August 29, 1925, and discharged January 29, 1926; was convicted of murder and sentenced to imprisonment in the penitentiary for 14 years.

Your letter further states that at the time Sergeant Russell was suspended he had a service of approximately 17 years to his credit and was 50 years of age.

Section 22 of the Policemen's Annuity & Benefit Fund Act provides that there shall be deducted from each payment of salary of each male present employee less than 57 years of

age, 1 per cent of such salary for widow's annuity purposes and that such deduction shall be continued during the service of each such present employee until he shall attain an age of 57 years.

Paragraph "F" of Section 27 of the Act provides that when any present employee shall have attained an age of 50 years or more, but less than 57 years, while in the service, and shall have served 10 years or more and shall resign or be discharged from the service, the amount of age and service annuity and the amount of prior service annuity to which such present employee shall have a right from and after the date of such resignation or discharge from the service shall be fixed as of his age at the time of his resignation or discharge.

Sub-paragraph "C" of Paragraph 5 of Section 39 provides that when any male policeman shall resign or be discharged from the service before he shall have become 57 years of age and shall enter upon annuity and shall not then be married, any sum accumulated from deductions from his salary for widow's annuity purposes shall then be refunded to him.

I am of the opinion that no refund of widow's contributions can be made to Sergeant Russell until he shall have entered upon annuity.

Section 7 of Division 2 of Chapter 38 of the Revised Statutes of the State of Illinois, as construed in *People v. Jennie Russell*, 245 Ill. 268, deprives of his citizenship a man convicted of murder unless such citizenship be restored by a pardon; there remains to him after judgment of the court is satisfied only his mere personal right by virtue of which his life, liberty and property are protected against deprivation. In the case of *Wall v. Pfanschmidt*, 265 Ill. 180, our Supreme Court announced the following principle:

"It is not the policy of the law of Illinois that forfeiture of property rights shall follow conviction of crime. The demands of public policy are satisfied by the proper execution of laws and the punishment of crime."

Upon the facts, I am of the opinion that Sergeant Russell is entitled to be paid his annuity as fixed by the provisions of the Policemen's Annuity and Benefit Fund Act.

Respectfully submitted,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Interpretation of Zoning Ordinance Relative to District Boundaries.

June 30, 1926.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

At your request the writer was present the other day at a conference held in your office, attended by members of your staff and the technical adviser of the Board of Appeals, concerning the interpretation of provisions of the Zoning Ordinance relative to the matter of district boundaries.

Paragraphs A and B of Section 23 entitled "District Boundaries," read as follows:

"Section 23. *District Boundaries.* (a) Whenever a portion of any district is indicated upon the use or volume district map as a strip paralleling an opened or unopened street, the width of this strip, unless delimited on the map by dimensions, lot lines, alleys, railroad or elevated railway rights of way, or otherwise, shall be assumed to be 125 feet measured at right angles from the nearest street line of the street to which it is parallel and adjacent.

(b) The district boundaries are, unless otherwise indicated, either street lines or lines drawn parallel to

and 125 feet back from one or more of the street lines bounding a block. Where two or more district designations are shown within a block 250 feet or less in width the boundary of the less restricted district shall be deemed 125 feet back from its street line. Where two or more district designations are shown within a block more than 250 feet in width the boundary of the more restricted district shall be deemed 125 feet back from its street line."

No particular difference of opinion arose concerning the meaning of Paragraph A or the first sentence of Paragraph B, but the difficulty presented was in the meaning of the last two sentences of Paragraph B, which are as follows:

"Where two or more district designations are shown within a block 250 feet or less in width the boundary of the less restricted district shall be deemed 125 feet back from its street line.

"Where two or more district designations are shown within a block more than 250 feet in width the boundary of the more restricted district shall be deemed 125 feet back from its street line."

To interpret these two sentences it is necessary to ascertain the meaning of the word "block" as used therein. While a "block" is defined by the Zoning Ordinance as that property abutting on one side of a street between the two nearest intersecting streets, yet to give it that meaning here would seem to lead to absurd results. We think it was here used in its generally accepted meaning, and as defined by the Century Dictionary and Webster, as being a square or the territory bounded by four streets. (*Harrison v. People*, 195 Ill. 466.)

With the thought, therefore, of avoiding conflict in the matter, we respectfully suggest that the location of boundary lines of districts where such boundary lines occur within blocks or squares be interpreted as follows:

In cases where a district boundary is within a block (square) less than 250 feet in width and extends along the direction of the length thereof, and no fixtures are shown,

the boundary shall be deemed located 125 feet from the bounding street lying within the less restricted district.

In cases where a district boundary is within a block (square) more than 250 feet in width and extends along the direction of the length thereof, and no fixtures are shown, the boundary shall be deemed located 125 feet back from the bounding street lying within the more restricted district.

By the word "fixtures," we mean alleys, dimensions, railroad or elevated railway rights of way, waterways, etc.

In cases where the district boundary line is within a block and extends along the direction of the width thereof and no fixtures are shown, said boundary shall be deemed to be 125 feet back from the nearest street.

While the above rules will, we think, carry out ordinarily the intent of the ordinance where boundary lines of districts occur within blocks, yet cases may occur in which to interpret boundary lines according to such rules would be plainly and palpably contrary to the intent of the Zoning Ordinance as shown by the maps. In such cases and in any other cases in which uncertainty may exist as to district boundaries within blocks notwithstanding the above rules of interpretation, we think the best course to pursue is to require that the matter be passed upon by the Board of Appeals.

Yours truly,

WILLIAM L. SULLIVAN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Liability of City for Claim for Back Salary.

July 3, 1926.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

Relative to Claim No. 7391 filed with your Committee on May 19, 1926, for back salary and interest alleged to be due the claimant, Ellis S. Henry, we herewith submit the following opinion and suggestions:

The records establish the facts to be that Mr. Ellis S. Henry was a civil service appointee in the position from which he was discharged, and that he was not removed from the civil service upon the filing of charges against him and a trial had thereon, as provided by Section 12 of the Civil Service Act, the only way in which such removal could legally have been made, but through certain irregularities which appear upon the records in the keeping of the Civil Service Commission. Mr. Henry's removal was therefore illegal and, upon mandamus action taken by him, his reinstatement was ordered and he was immediately restored to his position.

This, however, does not establish Mr. Henry's legal right to recover the back salary he seeks. One cannot sue for the back salary of a civil service position until he has by the direct action of certiorari or mandamus been restored to such position, for the reason that he must first establish his right to the position and for the further reason that during the time for which he seeks to recover the salary, such salary may have been paid to *de facto* incumbents who performed the duties of the position. Upon securing his reinstatement by mandamus or certiorari the civil service employee's right of action in debt or assumpsit accrues for the back salary.

City of Chicago v. People, 210 Ill. 83, 93.

Kenyon v. City of Chicago, 135 Ill. App. 229.

Bullis v. City of Chicago, 235 Ill. 472, 480.

Kenneally v. City of Chicago, 220 Ill. 485.

But in such subsequent action the rule applies that such salary or compensation which has been paid in good faith to a *de facto* employee during the time the position was in his possession cannot be recovered again from the municipality by the *de jure* officer.

People ex rel. McDonald v. Thompson, 316 Ill. 16.

People ex rel. Sartison v. Schmidt, 281 Ill. 320.

People ex rel. v. Burdette, 283 Ill. 124, 126.

In the claimant's case it is a fact that the salary he seeks has actually been paid to another. The issue therefore is: was the salary, appropriated for the position for the time the claimant seeks to recover, paid by the City in good faith to the *de facto* holder of the position? This is an issue which a jury may be demanded to determine or which may be conceded upon the facts presented.

In the claim as here presented nothing appears to establish the lack of good faith in the payment of this salary to the *de facto* except the established fact that claimant was illegally removed from his position, but this does not, of itself, constitute bad faith. The mandamus action instituted by the claimant was only for reinstatement in his position. The mere holding of the court that the claimant had been wrongfully deprived of his position is not conclusive *in this case* on the issue of good faith in the payment of the salary to a *de facto* appointee, because in every such action for reinstatement the mandate for such reinstatement must be based on the court's holding that the petitioner has been wrongfully and illegally deprived of his position. And yet, as stated by the Supreme Court in *Bullis v. City of Chicago*, 235 Ill. 472, 480:

"If the (claimant) was wrongfully prevented from performing the duties of his office he may recover his salary for the time during which he was so prevented, *where it has not been paid to anyone performing the duties of the office.*" (Our italics).

This is quoted with approval by the Supreme Court in the leading case of *The People v. Schmidt*, 281 Ill. 211. In the latter case the plaintiff, though wrongfully and illegally discharged from his position, was denied the right to recover the salary under the rule announced by the court that:

“If the salary or compensation has been paid in good faith to a *de facto* employee during the time the position was in his possession, it cannot on principle and by the weight of authority, be recovered again from the city, county, state or governmental subdivision by the *de jure* officer.”

It is true, as stated by the claimant, that counsel representing the Corporation Counsel in the mandamus action were constrained to admit that the facts pertaining to the claimant's removal tended to establish the contention that such removal was irregular and therefore illegal, thus entitling claimant to the writ of mandate for his reinstatement, but the right to back salary was not there involved and, as already shown, constitutes no admission as to claimant's right to secure back salary as now demanded.

In the case of *People ex rel. McDonald v. Thompson*, 316 Ill. 16, which was an original action in the Supreme Court for mandate to compel the immediate restoration of petitioner to his former position and to pay him the salary of the position from the time of his alleged unlawful removal, the Supreme Court allowed such salary only from the time of the Circuit Court's judgment quashing the Civil Service Commission's record of the discharge, and not for the time from discharge by the Commission until such judgment of the court.

The difference in the two cases is that in the McDonald case there existed the record of the Civil Service Commission, made pursuant to Section 12 of the Civil Service Act, to warrant the discharge, whereas in the claimant's case there is no such record. It would seem, therefore, that the Civil Service Commission's record is sufficient to authorize the payment in good faith of the salary of the discharged employee to the *de facto*. This is the substance of our opinion of date Novem-

ber 20, 1925, in the matter of the claim of John C. McDonald to back salary (Opinions of the Corporation Counsel, Francis X. Busch, 1925-1926, page 434). The opinion here referred to applied generally to the claim here presented and is therefore referred to as applicable to the claim.

In the matter of paying the salary of a *de jure* officer to *de facto* appointees, on the issue of good faith, it must not be forgotten that, no matter how such civil service employees may be discharged, the public service must proceed and the heads of departments must, as a mandatory duty, fill the vacancies created by the appointment of others to the position.

People ex rel. Roderick v. City of Chicago, 283 Ill. 462.

People ex rel. v. Kipley, 171 Ill. 44.

Interest is demanded by the claimant. There is no legal warrant whatever for the interest claim. Twice in the lower courts has this claim been denied, and in no case of our knowledge has such interest been awarded. There is neither *ex contractu* nor *ex lege* liability for interest. The claim here presented must have for its basis the appropriations, and this is limited exclusively to salary.

Again, even if liability might be conceded upon facts to be properly presented in support of this claim, the basis for such claim cannot be a full yearly salary of 365 days at the per diem appropriated. If claimant is entitled to anything at all it is just the sums of the total appropriations that were actually paid to the *de facto* employee who filled the position. This is a matter of record, but is not even presumed to be stated here.

The claim, as in form here presented, cannot be allowed. If, upon an investigation of the records and proof thereof, presented by the claimant or upon investigation by the City, the facts can be determined and stated which legally fix liability and such liability cannot be successfully resisted, and the record proof also discloses just what salary was actually paid to the *de facto* during the time for which claimant seeks to

recover, the amount of such claim can thus also be legally established and allowed.

Any action on the claim we think should be deferred for amendment in accordance with this opinion and the suggestion herein contained.

Yours very truly,

FRANCIS J. VURPILLAT,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Location of Hospital Near Private School.

July 7, 1926.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.

Dear Sir:

This will acknowledge the receipt of your letter of July 1st, enclosing a communication from Mr. S. L. Golan, attorney, relative to the application for license as a hospital of the Sheridan Rest Home at 669 Irving Park boulevard. This location, you state, is within 400 feet of the Immaculate High School for Girls.

You wish to be advised whether the location of the proposed hospital would come within the prohibition of Section 1863 of The Chicago Municipal Code of 1922, which reads as follows:

“No hospital of any kind or description shall hereafter be erected or established within 400 feet of any property used for a public or parochial school or as a public playground.”

The Immaculate High School for Girls, it appears, is conducted, owned and controlled by the Sisters of Charity of the Blessed Virgin Mary, whose main institution is Mount St. Joseph College, Dubuque, Iowa. The high school is open to girls who are desirous of obtaining a high school education without particular restriction as to their places of abode. Stipulated charges are made for tuition. While the school is distinctly Roman Catholic, yet there is no interference with the religious convictions of non-catholic students. The school does not belong to, and is not maintained by, any particular parish in the City.

Your department heretofore requested our views as to whether the Illinois Industrial School for Girls conducted by the Sisters of the Good Shepherd should be regarded as a public or parochial school within the meaning of the above ordinance.

In an opinion then written to your department by Assistant Corporation Counsel Leon Hornstein, and approved by the Corporation Counsel, the meaning of the terms "public school" and "parochial school" as used in the ordinance was given as follows:

"A public school is generally regarded as a school that derives its support entirely or in part from moneys raised by a general state, county or district tax (*Cook v. School District No. 12*, 12 Colo. 453). 'As used in the American reports the term generally refers to the common or public school existing under the laws of each state and maintained at the expense of the public' (Bouvier's Law Dictionary). In some cases the term 'public school' was held to be synonymous with common school (*Jenkins v. Inh. of Andover*, 103 Mass. 97).

"The term 'parochial school' is derived from the word 'parish.' The word 'parish' is used to designate ecclesiastical divisions, and when used in this sense is intended to indicate the territory committed to the particular charge of a parson or priest (*Twigg v. Tracey*, 104 Pa. 493). 'A parish is understood to be the territorial jurisdiction of a secular priest or a precinct the inhabitants of which belong to the same church or they may reside promiscuously among people belonging to any

church or be resident in several villages' (*Hebert v. Lavalley*, 27 Ill. 448).

"It will be seen from the above that a parochial school must be construed as one coming under the territorial limits of a parish of some religious sect which exercises ecclesiastical jurisdiction over the people of that faith therein and provides schools within the same."

We do not see any reason for departing from the views expressed in that opinion. Accordingly, it will be readily seen that the Immaculato High School for Girls is not to be regarded as a public school. A public school within the meaning of the ordinance is an institution which is supported in whole or in part by public taxation. Neither is it to be regarded as a parochial school, as it does not belong to any parish; neither is it owned or controlled by any parish nor under the territorial limits of any parish which exercises ecclesiastical jurisdiction over the people therein and provides schools within the same.

Ordinances in derogation of property rights must be strictly construed, and in view of the foregoing it is our opinion that the hospital should not be refused a license because of its location within 400 feet of the above mentioned high school.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Status of Building Housing Automobiles as to What
Is to Be Considered First Story.**

July 7, 1926.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

This is to acknowledge receipt of your letter of June 23 concerning Paragraph A of Section 1398 and its application to the proposed twenty-two story office building which would adjoin Wacker drive, La Salle street and an alley, and which will be used in part for the housing of automobiles. Said Paragraph A of Section 1398 reads as follows:

“Where such building is on a lot that adjoins two streets or a street and an alley, whose established grades are not at the same elevation, the story whose floor is higher than one foot below the lower of these grades, shall, for the purpose of this section, be deemed the first story of said building.”

It is planned to house automobiles on that floor which is approximately four inches above the grade of the lower level of Wacker drive, which arrangement would allow the storage of automobiles one story below the upper level of Wacker drive and about eight or nine feet below the level of the alley.

You wish to be advised whether that portion of the building contemplated for the storage of automobiles is a story or a basement within the meaning of the above section of the ordinance.

The lot on which the building is to be erected adjoins Wacker drive and an alley. The established grade of the lower level of Wacker drive and the established grade of the alley, we take it, are not at the same elevation, the grade of the lower level of Wacker drive being considerably lower than the grade of the alley.

We are of the opinion that the portion of the building contemplated for the storage of the automobiles should be regarded as the first story of the building. It is true that that will allow the storage of automobiles one story below the upper level of Wacker drive and below the level of the alley. The floor to be used for storage of the automobiles, however, will be four inches above the grade of the lower level of Wacker drive, and to permit such a situation seems to be the intent of the ordinance.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Summary Abatement of Nuisance at Junk Yard.

July 9, 1926.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.

Dear Sir:

Your communication of the 1st instant, relating to nuisances existing at certain listed junk yards, has our attention. You conclude your inquiry with the question as to whether or not the Superintendent of Police upon your direction should summarily abate a nuisance when so considered by you.

Section 2195 of The Chicago Municipal Code of 1922, in setting forth the duty of the Commissioner of Health on the subject of nuisances, states that after due notice has been served and the violator neglects or refuses to comply therewith such person shall be subject to a fine of not less

than five dollars nor more than fifty dollars for each such violation. Said section further includes the right of the Commissioner to cause such nuisance to be abated.

In the exercise of abatement, it is our opinion that he may call upon the head of the Police Department to enforce the provisions of the ordinance, in which event the accountability, if any there be, rests upon the Health Commissioner.

In order, however, that the ordinance referred to may not be disregarded in the part thereof regarding conviction and fine which precedes the abatement prerogative, it is suggested that before this drastic corrective be invoked convictions should first be obtained as provided by law.

Should this procedure be followed, we feel certain that the Superintendent of Police will not hesitate in giving you the necessary co-operation of his department when called upon.

Very truly yours,

JAY A. SCHILLER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Liability of City for Rescinded Contract of Election Commissioners.

July 10, 1926.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

In reply to your letter of June 29, 1926, *in re* claim of Hollander Express & Van Co. against the City of Chicago. containing a request for an opinion as to the liability of the

City in this matter, we desire to say that suit was brought in August, 1922, in the amount of \$50,000. At that time a plea of general issue was filed to the declaration, but afterwards a demurrer was filed. It was sustained and the claimant was given leave to file an amended declaration, which it did on July 10, 1925. A demurrer was filed to this declaration and has been pending since that time. Suit was brought by the claimant and in the declaration filed in said suit it was alleged that claimant entered into the contract with the Board of Election Commissioners on April 3, 1919, and that they performed the services under this contract up to February 12, 1921, when it appears that the Board of Election Commissioners rescinded the contract. The contract called for certain compensation for the storage of ballot boxes, booths, the delivery of ballot boxes, booths and other election paraphernalia, together with the transporting of same from the warehouses to the polling places in the various precincts in the City and the return of the same to the warehouses. Claimant maintains said contract ran for the period of four years from May 1, 1919, until April 30, 1926, and that they performed all the duties referred to in the contract as was provided in the contract up to the time that the Board of Election Commissioners rescinded the same. The ground for demurrer under the pleadings as they now stand is that the Board of Election Commissioners have no authority in law to bind the City of Chicago to a contract which runs beyond the term of the fiscal year in which it was executed; the theory of defense being that the Board of Election Commissioners are corporate authorities in so far as they act in expending money for elections which the statute requires the City to pay for and that while they act as corporate authorities they are bound with the restrictions fixed by the statute granting powers to corporate authorities to expend money for the corporation; that in no event could the Board of Election Commissioners bind the City for services rendered under a contract for which no appropriation had been made and which contemplated the expenditure of money beyond the term of the fiscal year.

The doctrine that Election Commissioners are corporate authorities was announced in the case of *Empire Voting Machine Company v. City of Chicago*, 267 Fed., page 165, where the court said:

“Moreover, the status of the members of the board has been defined by the Supreme Court of Illinois on at least two occasions. * * * In the case of *People v. Bd. of Commrs.*, 260 Ill. 345, after referring to a former holding that the election commissioners were corporate authorities, the court said: ‘It was declared * * * that they are appointed in a mode to which the municipality has given consent * * * and it necessarily follows that they are officers of the municipality within and for which they are appointed. The appellants were officers appointed for a definite term of office, for the exercise of certain powers and the performance of certain duties under the laws of the state, in and for the City of Chicago and the town of Cicero, and they cannot be distinguished in any manner from the officers occupying public positions created by the law, all of whom are municipal officers within the meaning of the Constitution.’ ”

In Paragraphs 91 and 92 of the Cities and Villages Act, Chapter 24 of the Revised Statutes, the fiscal year of the City is defined in Paragraph 92, which specifically provides:

“The City Council of cities and Board of Trustees in villages, shall, within the first quarter of each fiscal year, pass an ordinance, to be termed the annual appropriation bill, in which such corporate authorities may appropriate such sum or sums of money as may be deemed necessary to defray all necessary expenses and liabilities of such corporation, and in such ordinance shall specify the objects and purposes for which appropriations are made, and the amount appropriated for each object or purpose. * * * No further appropriation shall be made at any other time within such fiscal year. * * * ”

It is our opinion that the City can maintain its defense and defeat this cause of action on the theory that the contract was made without authority and in contravention of the provisions of the statute which requires the making of appro-

priations by the City Council for expenditures during the fiscal year. It is our opinion that if the demurrer is again argued, it will be sustained. There is no liability in our opinion on the part of the City to pay damages to the extent of \$50,000, which the claimant claims in the declaration.

It is our opinion that the City can defeat this claim, but as a business proposition, for the purpose of saving time and the costs of trial, we would say that if the matter could be settled for a nominal amount it would be good business policy and in the interests of economy for the City to dispose of the case on that basis. We could not, however, recommend that any substantial amount be paid for the reasons that we have above indicated.

Yours truly,

FRANK J. CORR,

Assistant Corporation Counsel.

Approved :

FRANCIS X. BUSCH,

Corporation Counsel.

Status of Surety Bonds of Officers of Retirement Board of Policemen's Annuity and Benefit Fund.

July 10, 1926.

RETIREMENT BOARD, POLICEMEN'S ANNUITY & BENEFIT FUND.

Gentlemen :

Complying with your request for an opinion relative to the certain surety bonds given the Retirement Board at various times by Peter S. Lynch, former secretary; Elmer C. Bye, former treasurer; George C. Sikes, former secretary; Leon L. Loehr, former treasurer; and John A. Cervenka, present treasurer, copies of which were attached to your letter, the following is submitted :

I.

The surety bond of John A. Cervenka, present treasurer, executed by the Indemnity Insurance Company of North America on July 10, 1925, protects the Board against loss in the event that the said John A. Cervenka fails to fulfill or comply with the condition of the bond, which condition is as follows:

“Now, Therefore, the condition of the above obligation is such that if the said John A. Cervenka shall well and faithfully perform the duties of said office of Treasurer of the The Retirement Board of the Policemen's Annuity and Benefit Fund, and shall safely keep and truly account for all moneys and property which may come into his hands as said Treasurer, and shall, upon the expiration of his term of said office for any cause, surrender and deliver over to his successor all unexpended moneys and all property that may come into his hands as Treasurer of said fund, together with all interest which may have accrued on said fund, then this obligation to be void, otherwise to remain in full force and effect.”

The bond became effective July 10, 1925, at twelve o'clock noon and expires May 1, 1927, at twelve o'clock noon.

There is no limit of time fixed within which suit must be brought on this bond, nor any condition required to be fulfilled precedent to such suit.

II.

The surety bond of Leon L. Loehr, former treasurer, executed by the United States Fidelity and Guaranty Company on October 29, 1923, indemnifies the Board in the sum of \$100,000 against loss arising through the failure of Leon L. Loehr to fulfill the condition of the bond, which condition is as follows:

“The condition of the above bond is such, that if the above bounden Leon L. Loehr shall perform all the duties which are or may be required by law to be performed by him, as Treasurer of the Retirement Board of the Police-

men's Annuity and Benefit Fund of the City of Chicago, in the time and manner prescribed or to be prescribed by law and shall indemnify said Board against any loss which may result from any action or failure to act on the part of himself or any of his agents, provided that neither the Principal nor the Surety herein shall be liable for any possible insolvency of any Bank selected or designated by said Board as a depository of funds or moneys of said Board, and when he shall be succeeded in office all books, papers, moneys and other things belonging to said Board, and appertaining to his said office; then the above bond to be void; otherwise to remain in full force and effect."

There is no limit of time fixed within which suit must be brought on this bond, nor any condition required to be fulfilled precedent to such suit. However, this bond has apparently omitted the words "shall surrender and deliver over to his successor in office" between the words "office" and "all" in the sixth line from the bottom of the portion above quoted.

III.

The surety bond of Goerge C. Sikes, former secretary, executed by the United States Fidelity and Guaranty Company on December 1, 1923, protects the Board against loss in the event that the said George C. Sikes fails to fulfill or comply with the condition of the bond, which condition is as follows:

"The condition of the above bond is such, that if the above bounden George C. Sikes shall perform all the duties which are or may be required by law to be performed by him, as Secretary of the Retirement Board of the Policemen's Annuity and Benefit Fund of the City of Chicago, in the time and manner prescribed or to be prescribed by law and shall indemnify said Board against any loss which may result from any action or failure to act on the part of himself or any of his agents, provided that neither the Principal nor the surety herein shall be liable for any possible insolvency of any Bank selected

or designated by said Board as a depositary of funds or moneys of said Board, and when he shall be succeeded in office shall surrender and deliver over to his successor in office all books, papers, moneys and other things belonging to said Board, and appertaining to the said office, then the above bond to be void: Otherwise to remain in full force and effect."

IV.

The bond of Elmer C. Bye, executed by the Southern Surety Company on October 19, 1921, indemnified the Retirement Board of the Policemen's Annuity & Benefit Fund of the City of Chicago, as employer, against loss resulting from any act or acts of fraud, dishonesty, forgery, theft, larceny, embezzlement, wrongful conversion, abstraction or misapplication on the part of said Elmer C. Bye directly or through connivance with others, during the period commencing October 19, 1921, and ending October 19, 1922, provided:

"1. That within ten days after discovery of any loss, the employer shall have delivered notice thereof to the Surety at its Home Office in Des Moines, Iowa.

2. That within ninety days after discovery of such loss, the employer shall have delivered to the Surety, at its Home Office in Des Moines, Iowa, written claim stating the items and the dates of the losses.

3. That no suit, action or proceeding shall be brought against the Surety by the Employer within Two Months After The Delivery of Such Statement of Claim, nor after the expiration of twelve months after the delivery of such statement of claim.

4. That any loss for which claim is made hereunder must be discovered during the term of this bond, or within fifteen months next after its termination.

5. This bond shall terminate, and the liability of the surety hereunder as to subsequent acts of the Employee shall immediately terminate:

(a) Upon discovery by the Employer of any loss through or default by the Employee;

(b) Upon the retirement of the Employee from the service of the Employer;

(c) Thirty days after receipt by the Employer of written notice of termination from the Surety, or thirty

days after receipt by the Surety of written notice of termination from the Employer."

V.

The surety bond of Peter S. Lynch, executed by the United States Fidelity & Guaranty Company, on the 19th day of July, 1921, indemnifying the Police Retirement Board of the Policemen's Annuity & Benefit Fund of the City of Chicago against loss occasioned by any act or acts of fraud, dishonesty or any criminal act by the Employee directly or through connivance, while occupying the position of secretary in the employer's employ, and during the period commencing July 14, 1921, and continuing until the termination of this suretyship and discovered within six months after its termination, subject, however, to the following conditions:

1. The Employer shall deliver notice of any default to the surety at its home office within ten days after the discovery of such default;

2. Any claim shall show the items and dates of losses and be delivered in writing to the Surety at its home office within three months after its discovery;

3. The Employer shall produce for investigation all books or any other evidence required by the surety; the surety shall have two months after claim has been presented in which to verify and pay same;

4. No legal proceedings shall be brought against the surety within the above mentioned two months, nor at all after the expiration of twelve months from the date of claim.

5. This suretyship shall only terminate by:

- (a) Notice in writing from either party;
- (b) Nonpayment of premium;
- (c) The Employer discovering Employee's default.

VI.

The bonds of Peter S. Lynch and Elmer C. Bye follow the usual and customary form given for employees or clerks, whereas the bonds should have been official bonds such as the one given by Mr. Cervenka, the present treasurer.

The form of bond for an employee which, in my opinion, would protect the pension fund is the form which I approved in connection with the bond of the present accountant, and I have delayed submitting this opinion in writing (confirming verbal opinion heretofore given in this matter last February) until a fully protective form of bond had been prepared by me and accepted by a bonding company, which has now been done in the case of the bond of the present accountant, Mr. Cassidy.

VII.

The special conditions in the bonds of Peter S. Lynch and Elmer C. Bye will increase the City's difficulties in enforcing liability on them if such action should be considered necessary.

Respectfully submitted,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Power of Illinois Commerce Commission Over Investments of Chicago Surface Lines.

July 12, 1926.

HON. JOSEPH B. McDONOUGH, Chairman, Committee on Local Transportation.

Dear Sir:

We have your communication of the 9th instant in which, pursuant to a motion made by Alderman McKinlay and approved by the Committee, you have asked for an opinion in respect to the following question, to wit: Has the Illinois

Commerce Commission jurisdiction and authority to require the companies constituting the Chicago Surface Lines to invest in securities approved by the Commission and approved by the State of Illinois for the investment of trust funds, the monies now contained in the reserve funds of those companies that have been set aside and accumulated to provide for depreciation and renewals of their street railways and for personal injury and damage claims. Said monies are now on deposit in various banking institutions in the City and, as we understand it, the purpose of such investment would be to increase the normal interest returns accruing from the use of such monies, consonant, however, with their retention in special accounts available for the uses in which such monies have been appropriated by the Traction Settlement Ordinance of 1907 and orders heretofore made by the Illinois Commerce Commission or its predecessor, the Public Utilities Commission of Illinois. We do not understand it to be claimed that said monies as now deposited are in any manner jeopardized, but the rates of interest paid by banks on such deposits are low and it may be assumed that prudent investment of said monies in securities approved by the laws of the State and by the Commission might increase the interest returns thereon without impairing the safety of said monies or their availability for the purpose for which they have been accumulated.

The street railway companies, except Chicago City Railway Company, derive their corporate powers and existence and the right to manage and control their properties and funds from the General Corporation Act of Illinois. The rights and powers of the Chicago City Railway Company, under its special act of incorporation of February 14, 1859, as amended, are not less broad than those of the companies incorporated under the general act. The companies derive none of their corporate rights or franchises from the Commission or from the Public Utilities Act (*New York Central Railroad Company v. Stevenson*, 277 Ill. 474), and, except in so far as said companies as public utilities have become subject to the regulatory police powers of the State and the jurisdiction of the Commission in respect to their rates and services and the

safety, comfort and convenience of their patrons, employees and the public, such companies have the same authority and capacity to manage and control their properties and funds as other private business corporations (*Munn v. Illinois*, 94 U. S. 113).

The commission is a purely statutory administrative body. Its entire authority is derived from the Public Utilities Act (*Public Utilities Commission v. Illinois Central Railroad*, 274 Ill. 36; *Illinois Commerce Commission v. C. C. C. & St. L. Ry. Co.*, 320 Ill. 214) which has been passed by the State in the exercise of its police power for the purpose of regulating public utility rates, controlling competition between utility companies, preventing unjust discriminations and providing for fair and reasonable utility services and the safety, comfort and convenience of the public (*Schiller Piano Company v. Illinois Northern Utilities Company*, 288 Ill. 580; *Village of Atwood v. Chicago, Indianapolis & Western Railroad Company*, 316 Ill. 425; *Northern Trust Company v. Chicago Railways Company*, 318 Ill. 402).

It is the duty of the courts to construe together the General Corporation Act and the Public Utilities Act and to give to each full force and effect so far as their provisions can be harmonized (*Lake Shore & M. S. R. R. Co. v. City of Chicago*, 148 Ill. 509; *Frick v. King*, 3 Scam. 144). The latter act contains numerous sections that authorize the Commission (1) to prescribe forms and methods of accounting to require information and reports in order that the Commission may be informed in the public interest of the true results of public utility operation; and (2) to approve security issues, oversee the disposition of the proceeds thereof and control the capitalization of public utilities in order to protect investors and patrons and prevent the undue accumulating of liens upon utility properties useful and necessary for the public service. Most careful reading of the act, however, discloses nothing therein contained to authorize the Commission to control or direct the management, investment or disposition of the general funds of any public utility. As stated by the court in

Public Utilities Commission v. Springfield Gas Company, 291 Ill. 209 (at page 234) :

“It must, however, be kept in mind in considering questions of business policy that the commission is not the financial manager of the corporation and it is not empowered to substitute its judgment for that of the directors of the corporation; * * *.”

We are, therefore, of the opinion that the question presented by the motion of Alderman McKinlay must be answered in the negative.

Very truly yours,

C. M. DOTY,
Assistant Corporation Counsel.

Approved :

FRANCIS X. BUSCH,
Corporation Counsel.

**Status of Moneys in Personal Injury and Damage
Claim Reserve Fund of Chicago
Railways Company.**

July 12, 1926.

HON. JOSEPH B. McDONOUGH, Chairman, Local Transportation Committee.

Dear Sir :

We have your communication of the 9th instant, transmitting copy of a resolution introduced in the City Council by Alderman Nelson, concerning the present care and future disposition of moneys contained in the Personal Injury and Damage Claims Reserve Funds of the Chicago Railways Company, the Chicago City Railway Company, The Southern Street Railway Company and the Calumet and South Chicago

Railway Company, constituting the Chicago Surface Lines. Inasmuch as the resolution, if approved by the City Council, is primarily intended to request and direct the Board of Supervising Engineers created by the Traction Settlement Ordinances of 1907 to furnish to the City Council certain information concerning said reserve funds and claims payable or that may become payable therefrom and to formulate and present to the City Council for its consideration certain plans for the future protection and disposition of such funds, we are somewhat in doubt as to any opinion now desired from the Law Department.

It would, we think, be premature to attempt to express any opinion concerning action to be taken or plans that may be formulated by the Board of Supervising Engineers until the attitude of the Board has been defined or the plans it may propose have been presented. In order, however, that the committee when passing upon said resolution may be informed of the ordinance provisions relating to said funds, we submit the following report:

Section 18 of the Ordinance of the Chicago City Railway Company (which is the same as Section 18 of the Ordinance of the Chicago Railways Company, Section 16 of the Ordinance of the Calumet and South Chicago Railway Company and Section 15 of the Ordinance of The Southern Street Railway Company) provides that the company for the purpose of paying damages for injuries to persons or property incident to the operation of its street railway systems

“may set aside as a separate fund such percentage of said gross receipts as the Board of Supervising Engineers shall estimate to be sufficient to protect the Company against all such claims, to the end that if the said City, or its licensee, shall elect to purchase the street railway property of the Company as provided by this ordinance, there shall be then available to the Company a fund sufficient to meet and discharge all legitimate claims for such damages. The percentage thus reserved may be changed from time to time by said Board of Supervising Engineers if and whenever they shall consider that the percentage theretofore reserved is either inadequate or excessive.”

It is then provided that :

“In case the balance of said fund at any time remaining shall be, in the judgment of the Board of Supervising Engineers, more than sufficient to protect the Company against all then unsettled claims, the Company shall pay to the said City fifty-five (55) per cent. of the estimated excess, and the Company at the same time shall be entitled to apply to its own use and benefit forty-five (45) per cent. of such estimated excess.”

Since the Board of Supervising Engineers is a joint board representing both the companies and the City, its judgment, under these provisions, of the reasonableness of funds accumulated to care for the purposes aforesaid would be conclusive. The power of the Board to take steps for the distribution of any estimated excess in such reserve funds is one that the Board can use at any time, and its failure to take such steps must result from its judgment that such funds do not exceed a reasonable provision for claims payable or which may become payable therefrom.

The ordinances then provide that in event the City or a licensee designated by the City shall purchase the properties of the companies the reserve funds then on hand shall be deposited with a depository or depositories provided for in the ordinances and all claims which shall thereafter become payable for injuries to persons or property occurring before the date of such purchase shall be paid from funds so deposited, but

“if the fund so retained and deposited shall be more than sufficient to pay and discharge said claims in full, then the said depository or depositories shall pay to the said City (or its licensee, as the case may be) fifty-five (55) per cent of such excess and the Company forty-five (45) per cent of such excess.”

No specific provision is made for the event of expiration of the twenty year period granted to the companies without the grant being renewed or the properties of the companies purchased by either the City or its licensee. It will be re-

membered, however, that the ordinances give to the City the right to so purchase the companies' properties or to designate a licensee to purchase them before or after the expiration of said twenty year period, and further, no corporation may lawfully acquire *and operate* such properties in the streets of the City after that time without the consent of the City. After the expiration on February 1, 1927, of the twenty year period provided for by the present ordinances, the existing companies (or their receivers) or any other person, firm or corporation, can operate said street railways in the streets of the City only at the will and sufferance of the City pending the grant by the City of more substantial legal authority for their maintenance and operation.

By the final paragraph of the resolution the Corporation Counsel is directed to consult with the Board of Supervising Engineers in respect to certain matters required of the Board. We shall, in event said resolution shall be recommended by the committee and passed by the City Council, be ready to consult with said Board at its convenience.

The committee, on motion of Alderman McKinlay, has requested an opinion concerning the power of the Illinois Commerce Commission to control the investment of moneys in said funds and also in the Depreciation and Renewals Funds of the companies. That opinion is separately submitted and its conclusions are not duplicated here.

Very truly yours,

C. M. DOTY,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Power and Authority of Illinois Commerce Commission
Concerning Expenditures From Depreciation and
Renewals Funds of Traction Companies.**

July 13, 1926.

HON. JOSEPH B. McDONOUGH, Chairman, Committee on Local
Transporation.

Dear Sir:

At its meeting on the 18th ult. your committee, after consideration of a resolution introduced into the City Council by Alderman Oscar F. Nelson, approved a motion by Alderman Henry L. Fick, which in substance directed the Corporation Counsel to submit to the Committee a report as to the power and authority of the Illinois Commerce Commission to order and require the companies constituting the Chicago Surface Lines to expend from monies contained in the Depreciation and Renewals Funds of said companies the amount of Five Million Dollars (\$5,000,000.00) for new cars and other equipment and for extensions of the street railway systems of said companies. Alderman Nelson's original resolution suggested that the company be required, by the expenditure of monies from said funds, to procure 350 new cars and to construct not less than 60 single track miles of street railway extensions, but the motion of Alderman Fick limited the total expenditures so to be made from monies contained in said funds to the sum of Five Million Dollars (\$5,000,000.00) without attempting to specify what portions of that amount should be expended for the purchase of cars or other equipment or for the construction of street railway extensions.

The committee is no doubt informed as to the provisions in the Settlement Ordinances of 1907, concerning the creation of said Depreciation and Renewals Funds, but we deem it advisable to discuss the nature and purpose of said funds as a foundation for the opinions hereinafter expressed.

Section 16 of the Settlement Ordinance of February 11, 1907, of the Chicago City Railway Company provides for the accumulation and expenditure of the Depreciation and Renewals Fund of that company as follows:

Section 16. After the expiration of the three (3) year period of reconstruction and re-equipment, particularly required by the terms of said "Exhibit B," under the heading of "Immediate Rehabilitation" and until the rights conferred upon the Company by this ordinance are terminated by the purchase of the said street railway system by the said City or its licensee or by reason of the default of the Company or otherwise, the Company at all times shall maintain the said street railway system and its entire equipment plant and appurtenances (including pavement and any subways or extensions thereof, together with their appurtenances and equipment, which may be built under the provisions of this ordinance) in first class condition by making from time to time such expenditures thereon for maintenance, repairs and renewals, as may be necessary or appropriate to give to the public first class street railway service in all respects. To this end, the Company shall make the following expenditures:

* * * * *

(2) On or before the fifth (5th) day of each and every month of each and every year that the Company continues to operate said street railway system after the expiration of said three (3) year period of "Immediate Rehabilitation," the Company shall deposit with one or more of the said depositories in a separate fund appropriately designated, *a sum equal to eight (8) per cent of the gross receipts of said street railways and property, which shall constitute a reserve fund, for taking care of renewals and depreciation of said street railways and property for the preceding month; and out of the said fund the Board of Supervising Engineers shall from time to time authorize the payment by the Company of such amounts as are necessary to pay for renewals of the said street railways and property, the portion of said fund remaining unexpended to continue in said fund as a provision for the depreciation of said street railways and property; and shall be disposed of as hereinafter provided.* No payments shall be made by said Company out of said fund except on the written certificate of the

Board of Supervising Engineers for renewals, which are hereby defined to be the replacement of any principal part of said street railways or of their equipment or appurtenances; and the Board of Supervising Engineers shall determine by classifications made from time to time what particular items of expenditure shall be considered as maintenance and repairs under the provisions of this ordinance.

The whole or any portion of such reserve fund for maintenance and repairs may be used for maintenance and repairs in addition to the annual expenditure for maintenance and repairs. The fixing of the said amount herein as the minimum amount to be expended annually for maintenance and repairs, and the fixing of the said amount herein as the minimum amount to be deposited for renewals and depreciation, shall not be held or considered as lessening or limiting in any way the obligation of the Company to expend whatever sum or sums may be necessary to be expended for maintenance and repairs and to expend whatever sum or sums may be necessary for renewals, to keep the said street railway system and equipment in first class condition, in every respect and at all times.

The amounts expended or deposited respectively as reserve funds, under the foregoing provisions of this section, shall be considered a part of the Operating Expenses of the street railway system hereby authorized, but in the event that the said street railway system shall be purchased by the said City or its licensee at any time under the provisions of this ordinance, the amount then on deposit in each of said reserve funds, or due to be deposited therein at the time of such purchase, shall be turned over to and become the property of the said City or of its said licensee.

The obligation herein assumed by the Company as to the maintenance, repairs and renewals of subways and extensions thereof, shall be held to be confined to that portion of any such subways or extensions, together with the structures and the appurtenances and equipment thereof, which may be used by or be subject to the use of, the said Company under the provisions of this ordinance, and to its fair proportionate share of the cost of maintenance, repairs and renewals of that part of any such subway or extensions or the appurtenances or equipment thereof, which may be used by or be subject to the

use of the Company jointly with the said City or its licensees or with the said Chicago Railway Company, such proportionate amount to be fixed and determined by the Board of Supervising Engineers.

Section 16 of said Ordinance for the Chicago City Railway Company is identical in its terms and provisions with Section 16 of the Ordinance of February 11, 1907, to the Chicago Railways Company; Section 14 of the Ordinance of March 30, 1908, to the Calumet and South Chicago Railway Company; and Section 13 of the Ordinance of April 15, 1909, to The Southern Street Railway Company.

The analysis of the ordinance provisions just quoted establishes the following characteristics of said Depreciation and Renewals Funds: (1) said funds have been set aside by the companies out of past earnings of their respective street railway systems; (2) the amounts so set aside have at all times been treated as proper charges to the operating expenses of said street railways; and (3) the monies contained in said funds have been specifically designated and appropriated as reserve funds to provide for the replacement of principal parts of said street railways as the same may hereafter require replacement or renewal on account of ordinary wear and tear, obsolescence, casual damage or other cause, so that the street railways in the city may be kept in efficient operating condition. A brief statement of the amounts that have been heretofore paid into and expended from said funds will make clearer the origin of the monies now contained in said funds, part of which it is intended by the resolution and motion above mentioned to have expended by the companies at the present time for new cars and for extensions of their street railways.

In his report now before the committee the committee's consulting engineer, Major R. F. Kelker, states that there has been placed in said funds from all sources the sum of \$60,095,000 and that \$38,422,000 have heretofore been expended therefrom for renewals of the companies' properties in accordance with the requirements of the Settlement Ordi-

nances. This would leave a total balance of \$21,673,000. In 1920, however, the Illinois Commerce Commission directed the companies thereafter to maintain said funds in two accounts. All monies then accumulated with interest thereafter accruing should be retained as a general depreciation and renewals fund. On January 31, 1926, the amount in that fund was approximately \$14,505,000. The Commission then directed that all payments thereafter made from the gross receipts for purposes of depreciation and renewals reserves should be placed in a separate account designated the Special Equipment Fund. Since 1920 all current renewals made in accordance with the Settlement Ordinances have been paid for out of the Special Equipment Fund, and the Commission has approved of expenditures out of the excess of said fund over current renewals for the construction of street railway extensions, for the purchase of new cars and for reconstruction work not chargeable to the Depreciation and Renewals Funds under the terms of the Settlement Ordinances. The total amount of expenditures so approved for purposes other than the renewals provided for by the Settlement Ordinances aggregates \$5,841,000, and the unexpended balance in the Special Equipment Fund on January 31, 1926, was approximately \$1,327,000. The intention of the resolution and motion referred to us is to request the Commission to cause the further sum of \$5,000,000 to be expended from monies in the general depreciation and renewals fund, and this opinion will be directed to that subject. The orders of the Commission heretofore made for expenditures out of the Special Equipment Fund will be adverted to hereinafter.

The Settlement Ordinances make no provision for the calculation of depreciation of the companies' properties except the provisions hereinbefore quoted for creating said depreciation and renewals reserves and for the payment of the cost of renewals as the same may accrue out of such reserve funds. The eight per cent of gross receipts paid each year into such reserve funds may therefore be taken to be an estimate of the amount of depreciation expected to accrue to the properties of the companies during each year. The percentages so set aside

would therefore be intended to preserve the integrity of the companies' investment in properties used and useful in the public service upon which the companies would claim a fair return. The cash funds now contained in such reserves would therefore be taken to represent the excess of the accrued depreciation of said street railway systems in respect to properties not yet entirely worn out, or in need of immediate replacement, over the depreciation which has occurred in respect to properties which heretofore have been required to be replaced.

That reasonable provision for accruing depreciation may appropriately be charged each year to the expenses of operation of a public utility is settled law. *People v. Stevens*, 203 N. Y. 7; *People v. Woodbury*, 202 N. Y. 619; *Knoxville v. Knoxville Water Company*, 212 U. S. 1. It is unnecessary to inquire at this time whether the eight per cent of gross receipts of the street railway companies heretofore set aside in said Depreciation and Renewals Funds and said Special Equipment Fund has been a reasonable provision. Undoubtedly, the terms of the Settlement Ordinances constituted valid contracts between the City and the respective companies prior to the passage of the Public Utility Acts of 1913 and 1921 and the entry of any orders respecting depreciation and renewals of the Public Utilities Commission of Illinois or the Illinois Commerce Commission, the state commission created by said public utility acts respectively. Nor do we need to consider whether said commissions might or may change or modify the amounts so required by the Settlement Ordinances to be so set aside each year, since said commissions in their orders relating to rates and valuations of street railways in Chicago approved the eight per cent of gross receipts theretofore and thereafter paid by the companies into their said funds as a fair and reasonable provision for depreciation and renewals reserves. The proposition presented by the resolution and motion referred to us is therefore as follows: Has the Illinois Commerce Commission authority to require and compel the companies to expend monies now contained in said reserve funds for the acquisition of new cars and other equipment and the construction of street railway extensions?

The Illinois Commerce Commission derives its powers entirely from the Public Utilities Act of 1921 and has no authority except such as is expressly conferred upon it. *Public Utilities Commission v. Illinois Central Railroad Company*, 274 Ill. 36. The Utilities Act is an exercise of the police power of the State. In *Schiller Piano Company v. Illinois Northern Utilities Company*, 288 Ill. 570, the court at page 585 stated the nature and purpose of the Public Utilities Act and the nature of the police power upon which it is founded as follows:

“Legislation in the exercise of the police power must have relation to and be appropriate for the protection, preservation and promotion of the public health, safety, morals or welfare. An act which has no tendency to affect or endanger the public in any of those particulars and which is entirely innocent in character is not within the police power. These general principles are universally recognized and will be found discussed and numerous authorities referred to in 6 R. C. L. 193, *et seq.* Under the police power the State has authority to enact legislation to regulate the charges and business of a public utility corporation, but if such legislation operates as a confiscation of private property or constitutes an arbitrary or unreasonable infringement on personal or property rights it will be held void, as in violation of the constitutional guaranty that no person shall be deprived of his property without due process of law. The Public Utilities Act of this State has no relation to the public health, safety or morals, but was enacted to protect the public against unreasonable charges and discrimination and to promote the general welfare.”

Further decisions to the effect that the Utilities Act is a regulatory police law intended to regulate rates, prevent discrimination and provide for public safety, convenience and welfare in respect to public utility services are *Public Utilities Commission v. Bethany Mutual Telephone Association*, 270 Ill. 184; *Public Utilities Commission v. City of Quincy*, 290 Ill. 360; *Village of Atwood v. Chicago, Indianapolis and Western Railroad Company*, 316 Ill. 425; *Northern Trust Company v. Chicago Railways Company*, 318 Ill. 402. These cases completely settle the nature and purpose of the Utilities Act as

founded entirely upon the police power of the State for the regulation of public service, and any fair construction of the Act must be made in the light of the purpose therein set forth.

Public utility companies are, of course, private corporations that have embarked their money and property in the public service to such an extent that regulation of their properties becomes necessary in order to provide for the safety, convenience and welfare of the public. They have affected their private business with a public interest and must submit to proper regulation by the State. In all respects not appertaining to the public service nor to the safety, convenience or welfare of the public their private properties are subject to the control and management of their corporate officials as fully as the properties of other private corporations. In the leading case of *Munn v. Illinois*, 94 U. S. 113, the court stated the foundation of affirmative regulation of public utility rates and services by governmental authority as follows (page 125) :

“This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, * * * we find that when private property is ‘affected with a public interest, it ceases to be *juris privati* only.’ * * * Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created.” ◊

Street railway companies in Illinois derive their corporate powers from the General Corporation Act. Under that Act the corporation, through its corporate officers, has power to manage its corporate properties and funds; to determine its financial policy and otherwise to do all acts proper to a private corporation except in so far as it must submit its properties to the regulation of the commission under the terms and provisions of the Utilities Act so that the public may be assured

of fair, reasonable and non-discriminatory services, reasonable provision for public safety, convenience and welfare and fair and reasonable rates. Such companies do not derive their corporate franchises from the Utilities Act, and the Commission has no power to grant any authority in the nature of a corporate power or franchise. *New York Central Railroad Company v. Stevenson*, 277 Ill. 474. In *Public Utilities Commission v. Springfield Gas Company*, 291 Ill. 209, the court denied the right of the commission under its power to regulate rates, service and safety, to interfere with the financial policies of a public utility company or to substitute its judgment for that of the corporate authorities in respect to matters that do not concern the regulation of public service under the police power of the State. The court said (page 234) :

“It must, however, be kept in mind in considering questions of business policy that the commission is not the financial manager of the corporation and it is not empowered to substitute its judgment for that of the directors of the corporation; * * *.”

We have carefully examined the Public Utilities Act and find nowhere therein any express power to require a public utility company to expend any particular fund belonging to the company in a manner contrary to the discretion and judgment of the corporate authorities in compliance with the direction of the Commission. The Depreciation and Renewals Funds are funds belonging to the company although impressed with a trust, and we are therefore of the opinion that the Commission has no authority to require the company to expend those funds as such in accordance with the Commission's directions. *Board of Public Utility Commissioners v. New York Telephone Company*, 70 L. Ed. (U. S.) 436.

The orders heretofore entered by the Commission for expenditures from the Special Equipment Fund for such extensions and equipment are not contrary to this conclusion, inasmuch as each of those orders was entered after such expenditures had been approved both by the City and the companies. Said orders do not attempt to require the companies

to expend monies already accumulated in reserve funds and owned by the companies but only to provide for expenditure of funds thereafter to be accumulated. While mandatory in form, such orders in fact amounted only to an approval of such expenditures from said funds and were an exercise of the Commission's power of approving reasonable provision by the companies for a reserve for renewals and depreciation. In effect such orders were therefore regulations of the operating expenses of the companies and their disposition after the entry of such orders, and did not attempt to require the companies to expend funds owned by them and already accumulated in reserve funds.

The Commission has, of course, general authority to require public utility companies under its jurisdiction to provide for extensions and for additional equipment of their properties in order to provide for the public service. Section 32 of the Act requires every public utility to "furnish, provide and maintain such service, instrumentalities, equipment and facilities as shall promote the safety, health, comfort and convenience of its patrons, employees and the public, and as shall be in all respects adequate, efficient, just and reasonable." Section 50 then provides that the Commission may order additions, extensions, improvements or changes to be made by any public utility if after a hearing the Commission shall find that additions, extensions, repairs or improvements to the existing plant or property of any public utility ought reasonably to be made to promote the security or convenience of its patrons, employees or the public. This power of the Commission in respect to street railway extensions is, of course, qualified by the necessity for municipal consent to the use of streets wherein such extensions shall be laid and for compliance with the frontage consent laws of the State. The orders of the Commission whether for extensions or for additional equipment must, of course, be reasonable. *Public Utilities Commission v. Smith*, 298 Ill. 151.

The Committee has already had under consideration the matter of requiring some miles of extensions to be con-

structed under the ordinances or under the general authority of the Commission. Should the committee cause ordinances to be passed authorizing any such extensions, we shall, of course, present to the Commission a petition for its cooperation in causing them to be constructed. The manner in which such extensions could be financed by the companies would then arise on the hearing of the petition.

While, as above stated, we are of the opinion that the Commission has no authority to direct the disposition of monies in the Depreciation and Renewals Funds of the Companies as such, and may not therefore require the companies to expend therefrom the sum of \$5,000,000 for extensions and equipment against the judgment and discretion of the corporate authorities of the companies, *we do not by this opinion intend to say that the companies may distribute the monies contained in said reserve funds among bondholders or other security holders of said companies or make other disposition contrary to the terms of the Settlement Ordinances.* Said monies have been accumulated out of fares paid by the public and have been specifically appropriated for the renewal of principal parts of said street railways as the same may hereafter become unfit or unadapted for further use. Such monies are therefore an integral part of the companies' properties used and useful in the public service and may not be dissipated or withdrawn from the public service at the will of the companies either before or after the expiration of the twenty-year franchise period on February 1, 1927. Should the properties of the companies, or any of them, be placed in the hands of a receiver or receivers, whether appointed by a federal or state court, such receiver or receivers will possess no greater authority to distribute said funds than would the companies themselves. (Smith on Receivers, Paragraph 384; *Central Bank and Trust Corporation v. Cleveland*, 252 Fed. 530; *Louisville Trust Company v. Louisville, etc. Railway*, 174 U. S. 674). Nor will said receiver or receivers possess any greater or different authority for the maintenance and operation of said street railways in the public ways in the City

than would have been possessed by said company or companies had the receivership not been established.

Many contract provisions in the Settlement Ordinances clearly apprehend the possible termination of the companies' operating authority and are intended to be in effect even though the companies' permits for the use of the street shall have expired. The right of the City to produce or designate a licensee to purchase said street railway properties after February 1, 1927, is specifically provided. In event of such a purchase by the City or by its licensee, monies contained in the reserve funds are required to be delivered to the purchaser. These provisions give the City a definite legal interest in the preservation of such funds for the purpose to which they have been appropriated, and we shall be prepared, should the necessity arise, to take appropriate steps to protect such interest of the City and to safeguard the use of such funds exclusively for the purpose for which they have been set aside and accumulated.

Yours very truly,

C. M. DOTY,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Occupation of Chester Street from the Chicago and
North Western Railroad to Clybourn Avenue.**

July 13, 1926.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We have your communication of July 2d transmitting therewith a letter from John N. Tuohy of Ryan, Condon & Livingston, attorneys, dated June 17, 1926, in which letter

the contention is advanced that the City of Chicago has no authority through any of its agencies to permit the use or occupation of a street known as Chester street from the Chicago and North Western Railroad tracks easterly, purporting to be occupied by the Nollau Wolf Manufacturing Company, pursuant to a council permit of July 15, 1924, as indicated in the Journal of the City Council on page 3578.

We have examined our plats and maps with reference to the above mentioned Chester street as well as the streets and alleys immediately surrounding said street. Chester street west of the railroad track has been vacated, and consequently that part of Chester street referred to as being approximately 250 feet easterly of said right of way of the Chicago and North Western Railroad, is what is commonly known as a *cul de sac* or blind alley. We have personally examined the physical condition of Chester street from Clybourn avenue westerly to the Chicago and North Western Railroad tracks. We find that the Consumers Company, which, according to the letter of Mr. Tuohy, is a tenant of Herbert E. Bell, Mr. Tuohy's client, has deposited on the south half of said street great piles of coal dirt covering the sidewalk of said Chester street several feet high and extending northward up to and beyond the center of said Chester street. Said Consumers Company has also deposited on said street a wreckage of hoisting machinery and boilers covering at places the entire south half of Chester street.

It is our opinion that the City has no right to issue a permit to any person, firm or corporation to use a street exclusively for private purposes. Consequently, neither the Nollau Wolf Manufacturing Company nor the Consumers Company would be entitled to obstruct said Chester street and use it exclusively for their purposes.

Yours very truly,

FRANK T. HUENING,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Inspection of Electrical Equipment Installed by Illinois Central Railroad.

July 14, 1926.

HON. JOHN T. MILLER, Commissioner of Gas and Electricity.

Dear Sir :

Your communication addressed to the Corporation Counsel requesting an opinion as to the authority of your department to make its usual inspections of electrical equipment installed within the City, where the same involves an inspection of electrical equipment now being installed by the Illinois Central Railroad Company on its right-of-way within the City, has been referred to the undersigned for consideration and reply.

The so-called Lake Front Ordinance (Council Proceedings July 21, 1919, page 969) provides a comprehensive plan of lake front improvement from the City limits on the south to the Chicago river on the north, and involves the reconstruction of the Illinois Central Railroad and terminal stations and the subsequent electrification of said railroad within the City limits.

Section 13 of Article V of said ordinance provides :

“As soon as the Central Company commences to remove and reconstruct its present terminal passenger station, now known as the Twelfth Street Station, as provided for in this ordinance, it shall at the same time proceed to rearrange and relocate its tracks, stations and appurtenances in such a manner as will be suitable for operation by electrical power as provided in this ordinance; and shall proceed with the installation of electrical equipment upon all its tracks so that it can operate its trains and cars by electrical power at the time and in accordance with the plan hereinafter set forth.

* * *

“In laying out its distribution and return circuits and in carrying on its electrification work, the Central

Company and each of the other railroad companies named in this section shall, respectively, adopt such methods for the prevention of damage by electrolysis to water pipes of the City, and to gas, water and other pipes and lead covered conductors owned by other companies or individuals as may be then recommended as practicable by the American Committee on Electrolysis; provided, however, that, should said Committee not have formulated standard methods for such prevention at the time that the decision must be made for carrying on the said work, such methods for the prevention of electrolysis as shall then be prescribed by the National Bureau of Standards as standards for other similar construction, shall be adopted by the said companies respectively.

"In installing electrical equipment, by whatever system of electrical propulsion any of said companies may adopt, the said companies shall install and thereafter maintain such reasonable, practicable and efficient methods and devices for overcoming interference with telephone, telegraph and other circuits, as are available at the time of the installation, with such reasonable and practicable improvements thereto as may thereafter, from time to time, become available, and shall co-operate with the City for the purpose of reaching an agreement on such methods and devices; provided that, in the case of disagreement between said parties, the question in dispute shall be referred to the National Bureau of Standards and its decision upon such disputed points shall be accepted and become binding upon the said companies respectively, as a compliance with the provisions of this ordinance."

Section 16 of Article V of said ordinance provides in part:

"The City hereby grants permission and authority to the Central Company, the Blue Island Railroad Company, * * * and each of them, respectively, to operate their cars and trains over, upon and along all of the tracks of said railroad companies, and each of them, as now or hereafter located, * * * by electricity or electrical motive power, as herein defined, and for this purpose to construct, maintain and operate systems of distribution for power over streets and alleys crossing the lands of the Central Company and the Michigan Central Railroad Company, and also to attach electrification

appliances and devices to the underside of structures over the tracks of said railroad companies, all for railroad purposes only; *and, subject to the ordinances of the City, to change from time to time the type of electrical construction or operation, and to rearrange and relocate their tracks for electrical operation, and to the Central Company to extend its system of distribution for power, light, heat and water along the right-of-way and tracks of each and all of said railroad companies.*”

Section 34 of Article VIII of said ordinance provides that said ordinance shall be construed as a contract “between the City, the Commissioners, the Central Company and said railroad companies, and by every one of them, with each and all of the others. * * *.”

I find nothing in the foregoing ordinance requiring or authorizing your department “to make its usual inspections” of the equipment involved herein. The original equipment is to be agreed upon pursuant to Section 13 of Article V above referred to, and changes may be made from time to time, subject to the ordinances of the City, as provided in Section 16 of Article V of said ordinance.

Respectfully submitted,

ROY S. GASKILL,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Powers of City Over Exhibitions of Pictures in Penny Arcades.

July 15, 1926.

MISS EFFIE D. SIGLER, Chief Censor, Moving Picture Censor Board.

Dear Madam:

This will acknowledge receipt of your communication of the 15th instant addressed to this department. You enclosed

three reports submitted to you by censors acting under your jurisdiction.

1. The report of Samuel E. White, censor, is in part as follows:

"On July 14, 1926, I visited the premises on first floor of building known as 434 South State Street, and used as an amusement arcade. * * * There were in the place machines designed for showing pictures through magnifying glasses, which machines work automatically when a coin is placed in the slot provided for such purpose. Most of these machines had on them pictures of women in various stages of nudity."

2. The report of Ethel R. McDowell, censor, states:

"That on July 14, 1926, I visited White City and inspected pictures shown in penny arcades through machines called Mutoscopes and * * * most of the pictures displayed were most objectionable, of nude and semi-nude women."

3. The report of Anna M. Costello, censor, declares:

"That on July 14, 1926, I visited Riverview Park penny arcade. * * * The subjects are nude or semi-nude, some very indecent postures."

You further advise us that the persons showing or exhibiting the said pictures have not obtained a permit for the exhibition of these pictures from the Superintendent of Police, and request us to advise you as to whether or not permits are necessary to exhibit these pictures, and in case of non-obtainment of permits, as to what is the proper procedure for your Board to pursue.

Paragraph 2785 of The Chicago Municipal Code of 1922 is as follows:

2785. *Permit required to exhibit moving pictures.*)

It shall be unlawful for any person, firm or corporation to show or exhibit in a public place, or in a place where the public is admitted, anywhere in the City of Chicago any picture or series of pictures of the classes or kinds commonly shown in mutoscopes, kinetoscopes, cinematographs, and such pictures or series of pictures as are com-

monly shown or exhibited in so-called penny arcades, and in all other automatic or moving picture devices, whether an admission fee is charged or not, without first having secured a permit therefor from the Superintendent of Police.

It shall be unlawful for any person, firm or corporation to lease or transfer, or otherwise put into circulation, any motion picture plates, films, rolls or other like articles or apparatus from which a series of pictures for public exhibition can be produced, to any exhibitor of motion pictures, for the purpose of exhibition within the City, without first having secured a permit therefor from the Superintendent of Police.

It is obvious from even a cursory reading that under the provisions of this section it is necessary to obtain permits to display the pictures witnessed by the censors.

Paragraph 2794 of The Chicago Municipal Code of 1922 provides that :

2794. *Penalty.*) Anyone violating any of the provisions of this article shall be fined not less than fifty dollars nor more than one hundred dollars for each offense. A separate and distinct offense shall be regarded as having been committed for each day's exhibition of each picture or series of pictures without a permit. Any person violating or neglecting to comply with any provision of this chapter, where no other penalty is provided, shall be fined not less than five dollars nor more than two hundred dollars for each offense.

It is our opinion that in order to enforce the penalties provided by Paragraph 2794, above quoted, you advise the Superintendent of Police of these violations and suggest to him that he proceed against the person, firm or corporation violating the provisions of Paragraph 2785 of The Chicago Municipal Code of 1922.

Very truly yours,

BARNET HODES,

Approved :

Assistant Corporation Counsel.

FRANCIS X. BUSCH,

Corporation Counsel.

Abatement of Smoke Nuisance at State Hospital Outside of City Limits.

July 16, 1926.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.

Dear Sir :

Your communication addressed to the Corporation Counsel, requesting an opinion as to the power of your department to abate a smoke nuisance caused by the chimney of the Chicago State Hospital situated within the corporate limits of the township of Norwood Park and outside the corporate limits of the City of Chicago, has been referred to the undersigned for consideration and reply.

In and by Section 8 of Part Three, Paragraph 298, Chapter 24, Illinois Revised Statutes (Cahill) 1923, the City Council is given the following powers :

“The City Council shall, by ordinance, be empowered to declare and define nuisances and abate the same, and shall have the power to regulate the location and conduct of hospitals and infirmaries.”

The exercise of the foregoing power is limited to the corporate limits of the City.

In and by Clause 8 of Section 221, Paragraph 453, Chapter 38, Illinois Revised Statutes (Cahill) 1923, it is provided :

“It is a public nuisance * * *

“To erect, continue or use any building or other place for the exercise of any trade, *employment*, or manufacture, which, by occasioning noxious exhalations, offensive smells or otherwise, is offensive or dangerous to the health of individuals, or the public.” (Italics ours).

Section 211 of the foregoing act provides a penalty for violation thereof, by a fine not exceeding \$100.

I find no statutory authority under which your department can act in its official capacity in the matter of abating nuisances outside the corporate limits of the City of Chicago. However, any citizen may proceed by complaint before the police magistrate in the township in question, or by information, to recover the statutory penalty for any violation of the foregoing act, which in my opinion is broad enough in its provisions to include the particular nuisance complained of.

Respectfully submitted,

ROY S. GASKILL,
Assistant Corporation Counsel.

Approved :

FRANCIS X. BUSCH,
Corporation Counsel.

Renewal of Permits for Projecting Illuminated Signs.

July 16, 1926.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir :

In reply to your communication addressed to the Corporation Counsel, requesting an opinion as to the rights of the City with reference to the removal of projecting illuminated signs from buildings for failure to renew permits therefor, I respectfully submit the following :

In your communication you state :

“Recently the City’s representatives serving notices for such signs as these attached to buildings closed by the U. S. Marshal, because of injunction, found that they were unable to locate the owners, and therefore unable to formally serve notice to remove.

“The same condition also prevails on premises under custody of the sheriff, where sheriff’s sale is to be or has been held and owner cannot be found.”

In and by Clause 19, Paragraph 65 of Article V of Chapter 24, Illinois Revised Statutes (Cahill) the following among other powers, are delegated to the City Council:

“19. To regulate and prevent the flying of flags, banners, or signs across the streets or from houses.

* * *

“99. To regulate the use of space over the streets, alleys and public places of the City, and upon payment of proper compensation, to be fixed by ordinance, may permit the use of said space more than twelve feet above the level of such streets, alleys or public places.”

Under and by virtue of Clause 9 of said Paragraph 65, *supra*, the City Council is given power to regulate the use of streets, and Clause 10 provides that said City Council may “prevent and remove encroachments or obstructions upon the same.”

From the foregoing it is clear that express power is conferred on cities and villages to *regulate* the use of their streets and to *prevent* obstructions and encroachments thereon. (*City of Sullivan v. Best*, 286 Ill. 315).

The primary object of streets and highways being for passage and travel by the public, neither individuals nor abutting property owners on such streets or highways can be deprived of such use. Municipalities under the power of exclusive control and regulation of streets and highways may permit them to be used in any manner consistent with the public right of user thereof, but any special use must be subject to the rights of the public at large, and this applies as well to the space above and below as on the surface thereof. (*People v. Field*, 266 Ill. 609).

Section 1643 of The Chicago Municipal Code of 1922 provides that it shall be unlawful for any person to erect or maintain any illuminated sign over any sidewalk, street, etc., except in accordance with the ordinances of the City of Chicago.

Sections 1644, 1645 and 1646, as amended (Council Proceedings January 30, 1925, page 4693) provide: 1644—Compensation for maintenance of projecting illuminated signs;

1645—Application—permit, providing that such permit shall authorize the applicant “to operate and maintain the sign so erected for the period of one year from the date of the issuance thereof.” Section 1646 pertains to location and time of illumination, and further provides that “The authority for the erection of any such sign may be revoked at any time by order of the Mayor or of the City Council, * * *.”

With reference to the failure to renew permits upon their expiration it might be well to obtain an order, either from the Mayor or the City Council, revoking the authority for the maintenance of the sign in question, and thus place the owner in the position of maintaining such sign in violation of the ordinance relating to permits. I am of the opinion that any such sign so maintained without compliance with the ordinance can be removed by order of the Commissioner of Public Works pursuant to Section 3699, as it would be an encroachment above but within the street lines not authorized by the City.

Section 3699 provides that “if the owner cannot be readily found for the purpose of such notice (to remove) the commissioner of public works shall cause the same to be removed to some suitable place.”

Respectfully submitted,

ROY S. GASKILL,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Driveways Extending Beyond Lot Line.

July 17, 1926.

HON. N. E. MURRAY, Superintendent of Sidewalks.

Dear Sir :

Your communication addressed to the Corporation Counsel, relative to the construction of driveways across sidewalks has been referred to the undersigned for consideration and reply.

Specifically you ask :

“Would a rider placed on a driveway permit with a rubber stamp forbidding any portion of the driveway, which would include the approaches, extending beyond the lot line produced, be legal ? ”

Section 3568 of The Chicago Municipal Code of 1922 provides in part :

“* * * Gradual approaches to the regular sidewalk grade shall be made from the grade of the driveway. *The slope of any driveway and the approaches thereto shall not exceed one inch vertical to one foot horizontal in any direction.* * * *” (Italics ours).

In view of the foregoing provision it would be impossible to build a driveway in compliance with the ordinance without going beyond the lot line produced. To attempt such construction within the lot line would violate the ordinance with reference to pitch and would either leave an abrupt step-off from the sidewalk to the driveway, near the curb, or you would have to increase the pitch of the incline.

Valid ordinances are binding on the City as well as the public at large; neither has the right to disregard them so long as they remain unrepealed.

By reason of the foregoing I am of the opinion that the proposed rider would not be valid.

Respectfully submitted,

ROY S. GASKILL,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Building Requirements for Five-Story Garage.

July 17, 1926.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

This will acknowledge the receipt of your letter of July 14th relative to application for a license for a public garage in building at 916-918 South Wabash avenue, and requesting the views of this department.

The building is five stories in height, of mill construction, and is equipped with an automatic sprinkler system. Under Section 1398 of The Chicago Municipal Code of 1922 a building over three stories in height used for the "purpose of housing five or more self-propelled vehicles or other wheeled machines containing in the tanks thereof volatile inflammable liquid fuel or power shall be of fireproof construction throughout and shall be equipped with an approved system of automatic sprinklers." This building, as we understand it, has the automatic sprinklers required but is not of fireproof construction.

By the applicant for the permit, however, the claim is made that the building in question need not be of fireproof construction as it "has been in continuous use for the last 19

years as an automobile service station," and that, therefore the provision of Section 1398 that such a building more than three stories in height shall be of fireproof construction is not applicable to it.

Section 1398, among other things, recites the following :

"1398. *Buildings Built or Altered Since July 22, 1912—Requirements—Exceptions.*) (a) Every building or structure erected since July 22, 1912, and every building or structure in existence on July 22, 1912, and thereafter increased in size or otherwise altered or thereafter converted and used for the purpose of housing five or more self-propelled vehicles or other wheeled machines, containing in the tanks thereof volatile inflammable liquid fuel or power * * * where such building or structure is more than one story and less than four stories in height, shall be of fireproof construction throughout, or shall be equipped throughout with an approved system of automatic sprinklers. * * * Every such building or structure more than three stories in height shall be of fireproof construction throughout and shall be equipped with an approved system of automatic sprinklers."

Section 1398 of The Chicago Municipal Code of 1922 was originally enacted July 22, 1912, as Section 145. To said Section 145 amendments were made until it appears in its present form in Section 1398. We have made a careful examination of the section and amendments thereto since the time of its first enactment until the present as well as of opinions of this department covering the matter.

Under Section 1398 a five story building of mill construction in existence on July 22, 1912, and then used for the purpose of housing five or more self-propelled vehicles or other wheeled machines, containing in the tanks thereof volatile inflammable liquid fuel or power, need not now be changed to fireproof construction in order to operate a public garage therein unless the building was increased in size or otherwise altered since July 22, 1912.

The test in the present case, therefore, is whether the said building was in existence and used on July 22, 1912, for the

purpose of housing five or more self-propelled vehicles containing in the tanks thereof volatile inflammable liquid fuel or power, and not thereafter increased in size or altered.

If it was so used on that date and continuously up to the present time, it might still be used under Section 1398 to house any number of automobiles, whether as a public garage, service station, repair shop or any other use in which five or more automobiles are housed containing in their tanks inflammable liquids, as Section 1398 sets forth the ultimate requirements covering such buildings so used.

From the affidavits submitted, the accuracy of which we have no reason to question, it is our opinion that the building is not a building erected or converted into a building used for the housing of five or more self-propelled vehicles containing in the tanks thereof volatile inflammable liquid since July 22, 1912, and therefore may be continued as a building to house five or more such vehicles.

Section 1398 being expressly not retroactive the fundamental type of construction of the building need not be altered, but the building should be made to comply with those other requirements of regulation or equipment applicable to all public garages contained in the Fire Prevention Code, if it does not already so comply.

This building, in the manner in which it was used July 22, 1912, could not have been licensed at that time as a public garage as it was not at that time within the then definition of a public garage, which definition as you know has been changed from time to time by ordinance. It should have been required later to take out a license when its operations did fall within the definition given of the term public garage. But as stated above, the test is not whether it was licensed as a public garage on July 22, 1912, but whether at that time it was used to house five or more self-propelled vehicles containing gasoline, and it is claimed it was. Your own investigation of October 31, 1924, shows that it was then being so used.

Accordingly, it is our opinion that, in so far as we are advised in the matter, a license for a public garage in this build-

ing may be issued as set forth above unless you should find that the building was not used on July 22, 1912, for the housing of five or more self-propelled vehicles containing gasoline.

The affidavits you forwarded are herewith enclosed, as well as an additional affidavit from L. S. Maremont, secretary of the Maremont Manufacturing Company.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Right of Laborer Participant in Municipal Employees'
Annuity and Benefit Fund to
Withdraw Application.**

July 19, 1926.

RETIREMENT BOARD, MUNICIPAL EMPLOYEES' ANNUITY &
BENEFIT FUND.

Gentlemen:

Replying to your request for an opinion as to the right of a laborer participant in the fund to withdraw his application as such participant the following is submitted:

Your letter states that Jacob Schejbal, maintenance man at the Contagious Disease Hospital, Department of Health, applied to become a participant in the fund at the April meeting of the Board; that his department was notified to make the necessary deductions from the first available payroll; that before any deduction was made he was separated from the service on May 3, 1926, and no deduction was made; that he later came back under temporary authority and worked under

the title of repair man; that he has petitioned the Board to be permitted to withdraw his application as an unskilled laborer as he feels that he cannot afford to contribute the necessary amount out of his wages, which he claimed had been reduced after filing the application; that he is exempt from contributing while working under temporary authority.

Your inquiry is as to whether or not the Board has the authority to cancel his application, once it has been approved, should he be reinstated under his civil service title of maintenance man.

If any deductions had ever been made for this applicant he would come under the provisions of Section 39 of the act and would be obliged to either resign or be discharged from the service before he could separate himself from the fund.

There does not appear to be any provision in the act giving to any beneficiary of the fund the right to withdraw from the fund excepting upon resignation or discharge. In the present case, however, it is apparent that the applicant in question has not as yet become a participant in the fund, since no deductions have ever been made from his salary, and under these circumstances it would appear that he should be given the right to withdraw his application before the final step is taken which would make him a participant in the fund, namely, the making of deductions from his salary. In other words, until such deduction has been made, his status as a participant has not become fully established.

I am of the opinion that Jacob Schejbal should be permitted to withdraw his application before any salary deduction is made upon the same.

Yours respectfully,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Computation of Interest on Broken Service Credits of a Policeman.

July 19, 1926.

RETIREMENT BOARD, POLICEMEN'S ANNUITY & BENEFIT FUND.

Gentlemen :

Replying to your request for an opinion as to the proper method of computing interest where service of a policeman prior to January 1, 1922, has been broken, the following is submitted :

Your letter states that in the calculation of the amount of prior service credit of a policeman whose service prior to January 1, 1922, has been broken the practice up to the present time has been to take all periods of service prior to January 1, 1922, combine them and figure the prior service credit as though the service were one of continuous duration and immediately preceding January 1, 1922.

Your inquiry is as to whether interest on the amounts accumulated at the time of each separation from the department should be included for the period or periods prior to January 1, 1922, during which such policeman was not in the service of the Police Department of the City of Chicago.

Section 19 of the Policemen's Annuity and Benefit Fund Act as amended in 1925 provided that the Retirement Board shall ascertain the amounts which have been deducted from the pay of each present employee and apply them to any police pension fund in operation by authority of law at the time the act shall come into force and effect, and also all other amounts (except fines imposed for violation of rules or regulations of the Police Department) paid into such fund according to law by such present employee before January 1, 1922, and that each such present employee should be credited in his account in the Annuity and Benefit Fund with an amount equal to the aggregate of all such amounts deducted from his pay

and otherwise paid by him, with interest on such amounts at the rate of four per cent per annum from the dates when such amounts shall have been deducted or paid to the first of January, 1922.

It is very apparent that interest at the rate of four per cent must be computed on each separate payment made by a present employee from the date of such payment until January 1, 1922, without regard to whether or not the service of the policeman was continuous. I am of the opinion that each separate payment or contribution made by any present employee prior to January 1, 1922, should be credited to him as of the date said payment or contribution was made, and that interest on each such payment should likewise be credited to him from the date of such payment or contribution to January 1, 1922.

Yours respectfully,

GEORGE F. MULLIGAN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Rate of Salary to Be Used as Basis for Computation of Prior Service Credit of Present Employee.

July 19, 1926.

THE RETIREMENT BOARD OF THE POLICEMEN'S ANNUITY &
BENEFIT FUND.

Gentlemen:

Replying to your request for an opinion as to the rate of salary to be used as the basis for computation of the amount of prior service credit of a present employee, the following is submitted:

Your letter states that action was deferred on the application for annuity filed by William J. Judge and the application for John J. Carrigan for an increase in annuity on account of the fact that an important principle in the method of computation is involved, due to the fact that Section 14 of the Policemen's Annuity and Benefit Fund Act was amended in 1925.

Prior to the amendment of the law in 1925, the Policemen's Annuity and Benefit Fund Act provided in Section 14 thereof that for all purposes of the act it should be assumed that the annual salary of any present employee had been of the same amount throughout the entire period of service rendered by such employee prior to January 1, 1922, as such salary had been at five o'clock P. M. on December 31, 1921. At the July session of the Legislature Section 14 of the act was amended to read that the annual salary of any present employee should be assumed to be of the same period throughout the entire period of service rendered prior to January 1, 1922, as such salary was on said day. There having been a change of salary effective January 1, 1922, the action of the Legislature necessarily affects all computations made under Section 14 subsequent to such amendment. This change, however, applies only to computations of the prior service credit of a present employee made since the act was amended, as it is a rule of law that an amendment of a statute by a subsequent act operates precisely as if the subject-matter of the amendment had been incorporated in the prior act at the time of its adoption, *so far as regards any action had after the amendment is made.* (Black on Interpretation of Laws, Section 131).

You also inquire as to whether or not this amendment of 1925 will result in a discrimination against present employees who took annuity before its enactment. I would not say that the amendment discriminates against the class referred to because all present employees who took annuity before July 1, 1925, were given all the rights to which they were entitled under the law as it then existed. Whenever there is a change in any law, there is generally some one who is benefited, just as

when an increase of salary is granted to members of the Police Department it cannot be said to be discrimination against the men who had resigned from the department prior to the grant of the increased salary. The Legislature has the right to enact laws and place therein such terms and conditions as to the Legislature seems proper, so long as such laws do not violate the right of contract or other rights guaranteed under the Constitution.

I am of the opinion that as to all applications for annuity filed subsequent to July 1, 1925, by present employees, the amount of prior service credit of such present employees should be computed on the basis of the salary of such present employee as such salary was on January 1, 1922.

Yours very truly,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Opening of Michigan Avenue Under Tracks at Sixty-Third Street.

July 20, 1926.

HON. DONALD S. MCKINLAY, Alderman, 19th Ward.

HON. ROBERT E. BARBEE, Alderman, 17th Ward.

HON. WILLIAM D. MEYERING, Alderman, 8th Ward.

Gentlemen:

Your letter of June 15, 1926, with reference to the opening of Michigan avenue from 63d street across the Pennsylvania and New York Central rights of way to Marquette road is received, and in response to your request as to the necessary

procedure to accomplish the opening of the street, we submit the following:

Under Section 89 of Section 1 of Article V of the Cities and Villages Act, the City is empowered to extend streets across railroad rights-of-way. Before the City can proceed, however, to exercise the right of condemnation conferred by Clause 89 it must, under Section 58 of the Commerce Commission Act, submit its plans and specifications to the Commerce Commission for approval as to type and manner of location of crossing. The street should be carried across the tracks either by means of a viaduct or subway, and in such crossings there are three elements of cost: first, the cost of the easements for carrying the street above or below the rights of way; secondly, the cost of any physical disturbance of the tracks or any exclusive taking of part of the railroad right of way; thirdly, the cost of the construction work of the subway or viaducts. The first and second elements constitute the items which would be cognizable in a condemnation suit brought by the City against the carriers to extend the highway over or under the rights of way. In such a proceeding compensation for the easement ought to be nominal. Prior to the passage of the Public Utilities Act it was held that the City would be chargeable with the expense of the changing of the grade of the tracks where such elevation or depression was made in order to permit of the extension of the street across the railroad. However, since the creation of the Utilities Commission and its successor, the Illinois Commerce Commission, this item of expense has been included in the cost of making the crossing by means of a subway or viaduct and has thus been included in the apportionment of the total cost of such construction, which item is a matter over which the Commission asserts exclusive jurisdiction.

If the City can agree with the railroad companies upon the compensation to be paid by the former to the latter for the crossing easements and for any damages inflicted upon the railroad company by the extension of the street over the rights of way in the manner proposed, the Commission will

probably concur in such an agreement. If the City cannot or does not wish to agree with the railroad as to that item then the City may bring a condemnation suit and pay the damages adjudicated in such proceedings. Such suit should not be brought, however, until a suitable mode of crossing has been authorized by the Commission. In the event it is desired therefore to open Michigan avenue across the railroad rights of way indicated, an ordinance should be passed, which ordinance should include a provision directing the Corporation Counsel to negotiate with the railroad companies for the purpose of agreeing upon the terms and conditions upon which such easements shall be granted and directing that this office shall submit an agreed plan of construction to the Commission for the purpose of securing that body's approval and requesting an apportionment of the cost of constructing the crossing, and further providing that in the event of failure of the City and the companies to agree upon compensation to be paid for the easements and for damages inflicted upon the railroad company, if any, by the extension of the street, that the Corporation Counsel bring a proceeding in eminent domain to ascertain the damages to be paid. The Commerce Commission, under the general authority of Section 58 of the Commerce Act, cannot make a determination as to the amount of compensation for damages to be paid to the company. The Constitution of 1870 reserves the right of trial of such questions by jury to the parties.

Yours very truly,

JAMES J. COUGHLIN,

Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,

Acting Corporation Counsel.

Agreement in Relation to Farwell Building.

July 23, 1926.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir :

You submitted to us copies constituting a file of correspondence covering the operations of the City in connection with the West Adams Street Bridge and the agreement with the John V. Farwell Company concerning the shoring up and underpinning of its building pending such operations.

Your letter accompanying these copies gave us data and information in regard to the whole subject matter, and particularly asked the question whether any modification should be made in the agreement above referred to. The other documents indicated that while there might be some trouble or difficulty in the future, there was not at the present time any occasion for doing anything in anticipation of a possible future claim. In fact, we are of the opinion that nothing can now be done which will put the City in any better position if any claim arises in the future.

The examination of the correspondence and files in this matter has been supplemented by an examination of the premises. This was done by one of the undersigned personally, first alone, and then several times with the superintendent in charge of construction. As a result of this we submit the following :

The letter which originated with the engineer of bridges and was signed by the Commissioner of Public Works, dated April 23, 1926, recites the entire history of the matter. On August 25, 1925, the City entered into an agreement with the John V. Farwell Company, at that time owner of the building, regarding the City's obligation to under-pin and shore the southwest corner of said building and at the same

time to safeguard the building against settlement while the east approach for the Adams street bridge was being constructed. Since that agreement was entered into the building was purchased by Carson, Pirie, Scott & Co.

It would seem that the structure in question, which is an old building alongside of the river, has been under-pinned on the river side thereof in years past several times. This was necessitated by the fact that the water in the river had receded and caused the top of the piles to extend above the surface of the water. When piles are exposed to the air they lose their vitality in a much shorter duration of time than if they are entirely submerged. It appears further, that, because the southwest corner of the building had not been previously under-pinned, the foundation had given way and caused certain large cracks in the basement wall. Our engineers in charge of the excavation, the sinking of caissons and the building of cofferdams for the pit and approach of the Adams street bridge, made ample and positive provisions for underpinning and shoring, so that the said corner of the building would not recede any further.

While the work on the bridge was in progress, the new owners, Carson, Pirie, Scott & Co., made further extensive interior repairs to the building. They also changed the first floor fronting on Adams street by removing the glass front and filling in a brick facing. Just how far these things affected the situation is problematical, but whatever effect they had they cannot be charged against the City.

The question in the minds of the City's engineers is purely a hypothetical one. They would like to be informed whether or not the City would be liable to Carson, Pirie, Scott & Co. under the agreement with J. V. Farwell, since Carson, Pirie, Scott & Co. have undertaken and are making improvements that had not been originally contemplated by the John V. Farwell Company at the time the City made the agreement with the Farwell Company.

We have requested the superintendent to take all reasonable care and precaution to insure the further safety of

the foundations of said building, and we recommend that efforts be continued along this line. From our several observations of the building it would seem that no injury has been done up to the present time and, since the taking of additional precautions that the City's engineers have provided for, it is likely none will occur in the future on account of the construction work to the approach of the West Adams street bridge.

We note that a letter of Carson, Pirie, Scott & Co., of May 18, 1926, makes statements to the effect that settlement and cracking of walls and foundations of this building are due to the bridge construction work, but even if this is correct, the City's possible obligation to respond in damages under the terms of its agreement depends entirely upon circumstances not yet ascertained.

Inasmuch as all possible precautions have been taken to safeguard the City's operations and against any possible injury to the building, we believe that nothing further can be done but to wait and determine the question of possible liability when a claim is actually made and all the facts and circumstances are before us.

Yours truly,

FRANK T. HUENING,
LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved :

FRANCIS X. BUSCH,
Corporation Counsel.

Relocation of Supporting Columns of Elevated Railroad Structure.

July 26, 1926.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir :

We have your letter of the 9th instant transmitting copy of a letter from the Chicago Rapid Transit Company in respect to the relocation of supporting columns of the elevated railroad structures at the intersections of South Wabash avenue and East Van Buren street, East Jackson boulevard and East Monroe street and at the intersection of North Wabash avenue and East Washington street in accordance with the terms of an ordinance passed by the City Council on July 22, 1925, and accepted by the Chicago Rapid Transit Company on August 13, 1925. By Section 2 of said ordinance the City is required to procure whatever consents or permission of owners of abutting property or occupiers of sub-sidewalk space may be necessary to enable the company to relocate its supporting columns as provided in said ordinance; and in your letter you have asked us to advise you regarding any such consents from property owners or occupants of sub-sidewalk space that may be required before your department may issue permits to the company for relocation of its columns at the intersections named above and concerning any action your department should take.

The rights of owners of abutting property and of occupants of sub-sidewalk space will depend upon the ownership of the fee in the streets affected. Where the fee in the streets is vested in the City owners of abutting property have no rights in respect to use of the soil of such streets by the elevated railroads (*Stetson v. Chicago and Evanston Railroad Company*, 75 Ill. 74; *Doane v. Lake Street Elevated Railroad Company*, 165 Ill. 510) and occupants of sub-sidewalk space.

enjoy that privilege by permission of the City and in subordination of the City's right at any time to modify or terminate such occupancy in favor of the paramount use of the streets for street purposes. (*Sears v. City of Chicago*, 247 Ill. 204).

The intersections of South Wabash avenue and East Van Buren street, East Jackson boulevard and East Monroe street are in Fractional Section 15 addition to Chicago in Township 39 North, Range 14 East, and said streets were laid out for the use of the public by the Commissioners of the Illinois and Michigan Canal at the time of the original plat and subdivision of that addition to the City. In *Ryerson v. City of Chicago*, 247 Ill. 185, the Supreme Court, following the decision in *Rumsey v. City of Chicago*, 87 Ill. 348, which had related to the plat of the original town of Chicago by the Canal Commissioners, held that grantees of lots from said commissioners took title only to their respective lot lines and that as between the City and the owners of abutting property the fee of the streets is in the City. That case was one of the so-called sub-sidewalk cases in which the relations of the City and users of space under the sidewalks in different portions of the central business district were tested.

The intersection of North Wabash avenue and East Washington street was created by the original plat and subdivision by the United States of the Fort Dearborn addition to Chicago in the Fractional Southwest one-quarter of Section 10, Township 39 North, Range 14 East, and the Supreme Court of the United States in *State of Illinois v. Illinois Central Railroad Company*, 146 U. S. 387, and *United States v. Illinois Central Railroad Company*, 154 U. S. 225, and the Supreme Court of Illinois in *Bliss v. Ward*, 198 Ill. 104, and in *Williams v. City of Chicago*, 247 Ill. 240, another of the sub-sidewalk cases, have held that as between the City and the grantees or owners of abutting land in that addition to the City, the fee title to all streets and public grounds is vested in the City. That title has recently been further confirmed by an act of the Congress of the United States approved May 3, 1926, entitled "An Act releasing and granting to the City of Chicago any and all reversionary rights of the United States in and to

the streets, alleys and public grounds in Fort Dearborn addition to Chicago," whereby the United States has released to the City any possibility of reverter that might have remained vested in the United States in respect to the streets in that addition to the City.

The owners of property abutting the streets at the intersections above named where said supporting columns are to be removed and relocated have therefore no ownership or interest in the soil of such streets, and their consent or permission to such relocations will not be required. Also the occupants of sub-sidewalk space at such locations are licensees and permittees of the City. We may assume (the fact should be readily determinable from the records of your department) that the permits held by such occupiers of such sub-sidewalk space are subject to specific reservations of the right of the City at any time to revoke or modify such permits in event the City shall require the use of such space for street purposes. In any event, such a reservation in favor of the paramount purposes of the street would be implied in law, and the City Council, by passage of the ordinance of July 22d requiring relocation of said supporting columns has, by force of that ordinance, superseded any former permission for the use of sub-sidewalk space at the particular locations affected by the removal and relocation of said columns.

The occupiers of space that will be affected by such relocations should therefore be formally notified by you of the passage of the aforesaid ordinance and that their permits for the use of such space must be revoked or their use of such space so modified as not to interfere with or prevent the changes of structure required of the company in order to comply with the terms and provisions of said ordinance.

Very truly yours,

C. M. DOTY,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Insurance Policy Designed to Protect Treasurer Against Loss by Forgery.

July 27, 1926.

HON. JOHN A. CERVENKA, City Treasurer.

Dear Sir:

We have examined the policy designed to insure you as treasurer against loss by forgery. Such policy in the main seems to cover the situation, but is subject to some objections which we think may still be overcome at this time rather than to let them remain as a possible cause for misunderstanding in the future.

We suggest that in Paragraph 9 of the policy, where the assured's business is given as "a municipality," it should be changed to "a municipal officer."

We further recommend that the two paragraphs written out in the rider should be altered so that they will read as follows:

"It is hereby understood and agreed that the assured under this policy is the City Treasurer of the City of Chicago, Illinois, who shall be indemnified against loss in his capacity as City Treasurer and also in his capacity as ex-officio treasurer of The Board of Education of the City of Chicago and/or Municipal Employees' Annuity & Benefit Fund, Chicago, and/or Policemen's Annuity & Benefit Fund, Chicago, and/or Public School Teachers' Pension and Retirement Fund, Chicago, and/or Firemen's Pension Fund, Chicago, and/or Public Library Employees' Pension Fund, Chicago, and/or House of Correction Employees' Pension Fund, Chicago.

It is further understood and agreed that the words Checks and Drafts as defined in this Policy, shall include vouchers and warrants, and that this policy shall cover all checks, drafts, vouchers and warrants drawn on the assured against funds in the custody of the assured."

We believe that it is advisable to make the above changes on the policy, and it will then be in good form and will protect you against loss from forgery.

Yours truly,

LEON HORNSTEIN,

First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

**Liability of City for Damages on Account of Building
at La Salle Street and Wacker Drive.**

July 27, 1926.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

In your communication of July 7, 1926, addressed to the Corporation Counsel, you state that you have been notified by John Griffiths & Son Co., "to protect and support City property from any damage that may be caused thereto by the erection of a building at the southwest corner of La Salle street and Wacker drive, * * * that Wacker drive is now under construction under the jurisdiction of the Board of Local Improvements and that said construction work is not yet completed and that jurisdiction of this improvement has not been turned over to this department."

You then request an opinion as to whether it is incumbent on your department or the Board of Local Improvements to assume the responsibility for damage to City property by reason of the foregoing.

Under the provisions of the Local Improvement Act of 1917 and amendments thereto (Chapter 24, Paragraph 122

et seq., Callaghan's Illinois Statutes Annotated), it is provided in Section 74 thereof that:

"All contracts for the making of any public improvement, to be paid wholly or in part by special assessment * * * shall be let to the lowest responsible bidder in the manner herein prescribed, such contracts to be approved by the president of the Board of Local Improvements * * *."

Section 77 of said act provides in part:

"Said Board of Local Improvements may reject any and all proposals or bids, should they deem it best for the public good; * * *."

Section 82 provides in part:

"* * * All contractors, * * * shall, at the time of executing any contract for such public work, execute a bond to the satisfaction and approval of the Board of Local Improvements * * *."

Section 83 provides in part:

"* * * The board is hereby authorized to make, or cause to be made, the written contracts, and receive all bonds, authorized by this act, and to do any other act, expressed or implied, that pertains to the execution of the work provided for by said ordinance or ordinances, and shall fix the time for the commencement of the work thereunder and for the completion of the work under all contracts entered into by it, which work shall be prosecuted with diligence thereafter to completion, and said board may extend the time so fixed from time to time as they think best for the public good. The work to be done pursuant to such contract must in all cases be done under the direction and to the satisfaction of the board of local improvements, and all contracts made therefor must contain a provision to that effect. * * * ."

Section 3203 of The Chicago Municipal Code of 1922 creates the Department of Public Works of the City of Chicago.

Section 3206 thereof creates the office of Commissioner of Public Works, and Section 3211 defines his powers as follows:

"Said commissioner shall have charge of all public improvements commenced, or to be commenced, by the

city and shall have power, subject to the ordinances of the city, to regulate and control the manner of using the streets, alleys, highways and public places of the city for the erection of telegraph poles, or other poles or posts, for the laying down of gas, water or steam pipes, sewers, conduits and other underground construction authorized by law or the ordinances of the city, and to determine the location thereof, and shall have authority to cause the prompt repair of the streets, alleys, highways and public places, whenever the same are taken up or altered; *provided, that nothing herein contained shall be construed as relating to the construction of local improvements paid for in whole or in part by special assessment, but said commissioner shall have charge of all such local improvements paid for in whole or in part by special assessment upon their completion and acceptance by the board of local improvements, or upon completion, acceptance and approval by the court confirming the assessment, and said commissioner shall have power to enforce all provisions of any contract for such improvements which relate to the guaranty and maintenance of such improvements and the repairs thereto.*" (Italic ours.)

Section 3212 provides:

"It shall be the duty of said commissioner of public works, subject to the provisions hereof and the ordinances of the city, to take special charge and superintendence of all streets, alleys, and highways in the city, and of all walks and crosswalks, bridges, viaducts, docks, wharves, public places, public landings and public grounds in said city; * * * and of the creation of all public buildings; of all works for the widening, deepening or dredging of the Chicago river * * *, and of the harbor of said city; * * * and he shall award and execute all contracts for any work or public improvement the cost of which shall exceed the sum of five hundred dollars, * * * ; *provided, however, that nothing herein contained shall be construed as relating to the construction of local improvements paid for in whole or in part by special assessments, but said commissioner shall have charge of all such local improvements paid for in whole or in part by special assessment upon their completion and acceptance by the board of local im-*

provements, or upon their completion, acceptance and approval by the court confirming the assessment, and said commissioner shall have power to enforce all provisions of any contract for such improvements which relate to the guaranty and maintenance of such improvements and the repairs thereto." (Italic ours.)

From the foregoing it appears that the jurisdiction of the Department of Public Works does not attach to public improvements "to be paid wholly or in part by special assessment" until the completion and acceptance of such improvements by the Board of Local Improvements; that said Board of Local Improvements has sole charge and control of the construction of all public improvements "paid wholly or in part by special assessment" and that the jurisdiction of said Board in relation thereto is exclusive.

LATERAL SUPPORT.

From an extended research among the various decisions of the courts bearing upon this question it appears that there is in New York, New Jersey and Pennsylvania a well defined exception to the common law doctrine of lateral support in so far as it applies to streets and highways, the general rule being that the owner of land has a right to have the soil of his premises sustained by the lateral support of the adjoining land, but this right is limited to the soil in its natural state and does not extend to the support of any additional weight which the owner may place upon it, such as a building or other superstructure, near his boundary line. (*City of Quincy v. Jones*, 76 Ill. 231, and cases therein cited.)

The exception to the foregoing is stated in the case of *Hudson County v. Woodcliff Land Improvement Co.*, 74 N. J. L. 355, wherein the court held that the right to lateral support exists not only for a highway in its natural state, but also for the highway when so improved as to increase the lateral pressure, the doctrine controlling the rights of adjoining owners in this respect having no application to the case of a highway.

In the case of *Adlin v. Excelsior Brick Co.* 129 App. Div. (N. Y.) 713, the court held that the owner of lands is bound to give lateral support to an abutting highway, and if he wrongfully excavates so close as to cause it to cave in, he is liable for injuries caused thereby.

To the same effect is *Haverstraw v. Eckerson*, 124 App. Div. (N. Y.) 18, and *Milburn v. Fowler*, 27 Hun (N. Y.) 568, wherein it was held that the owner of a lot adjoining a highway cannot excavate his lot so as to render the highway unsafe. In the case last above cited, the court at page 568 said:

“It is claimed that there is no right of lateral support for the street unless it is alleged and shown that the highway is in its natural state and free from superincumbent earth which may increase the lateral pressure.

This doctrine, which, in the absence of any statutory regulations, controls the relative rights between adjacent owners, has no application to the case of a highway. * * *.

Any obstruction or interference with a highway is unlawful and *per se* a nuisance.

One cannot dig a pit on his own land so close to the highway that a traveler may fall into it unawares.

Certainly he cannot then dig that pit so as to cause a subsidence or destruction of the highway itself.”

In the case of *Scranton v. Peoples Coal Co.*, 256 Pa. St. 332, it was held that an abutting owner cannot remove minerals from under or adjacent to an established highway in such a manner as to cause a subsidence or injury thereto.

In *Pollock v. Pittsburg, etc., R. Co.*, 275 Pa. St. 467, the court held that the right of lateral support from abutting owners exists in favor of highways; that the adjoining owner owes the duty of such support to a highway as an obligation to the community, and, because of the superior claim, the support extends to the highway in its improved condition; that in this respect the liability differs from the duties and rights between adjoining land owners.

In *Chicago City Ry. Co. v. Rothschild & Co.*, 213 Ill. App. 178, the court held that an abutting owner who, by rea-

son of excavating on his own property, causes a street to be depressed, is liable for the resulting damages.

By reason of the foregoing, I am of the opinion :

1. That any street or highway being maintained by the City of Chicago at the location in question is entitled to the lateral support of the abutting property even though such street is not in its natural condition but has improvements therein and thereon.

2. That the adjoining owner owes the duty of such lateral support as an obligation to the community.

3. That the doctrine of lateral support as between adjoining owners does not apply to streets and highways.

4. That if the street in question is now under the jurisdiction of the Board of Local Improvements by reason of an incompleated public improvement "to be paid for wholly or in part by special assessment," such jurisdiction of said Board is exclusive.

5. That if the improvement of the street in question has been completed and accepted by the Board of Local Improvements, or if such improvement was not paid for wholly or in part by special assessment, then, in such case, such street as improved, is under the jurisdiction of the Commissioner of Public Works.

6. That the question of responsibility between the two above named departments of the municipal government rests entirely on the jurisdiction of the department involved as above indicated.

Respectfully submitted,

ROY S. GASKILL,

Assistant Corporation Counsel.

Approved :

FRANCIS X. BUSCH,

Corporation Counsel.

Status of Building Damaged by Fire.

July 27, 1926.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

This will acknowledge receipt of your communication of the 24th instant in reference to the building at 3501-3505 South Wabash avenue.

You advise us that in accordance with our suggestion you have caused a special examination to be made of this building with the view of ascertaining whether any ordinances of the City are being violated and that your "best opinion is that the building complies with all the requirements of the building ordinances for an existing building."

You undoubtedly predicate your opinion in part upon the report submitted to you by your inspectors who presumably made a thorough investigation of the premises and who advise you in a report dated July 23d, a copy of which you submit to us, that "a floor plan typical of each floor has been approved by this department on May 29th, 1926, showing additional exits and three new 24 inch stairway fire escapes to be provided and some window openings to be built up and some other work which is now under way and about 25 per cent completed. When contemplated work shown on approved plan is completed each flat will have two ways of egress and will comply with Section 727. The building was occupied as an apartment house previous to 1903; at that time ordinary construction was permissible for the use made of it, and this fact makes its present occupation legal."

You have also satisfied yourself that the work now being done upon the premises "does not seem to come within the scope of Paragraph (c), Section 727, as there are no material modifications, structural changes or new and different occupations being done or contemplated, * * *."

However, although the building in your opinion seemingly complies in every respect with the ordinances, you state that you are "strongly of the opinion that by virtue of the immense amount of inflammable material (wood) used in its construction, its large area, its height and the large open court within it, that it constitutes a grave fire menace, and in the event of a fire making a little progress before discovery, there would no doubt be a great loss of life among the occupants."

You also state that in your opinion Section 402 of The Chicago Municipal Code does not cover the matter, as it is not a factory, work shop or place of employment, and that it complies with the ordinances for existing buildings and that you further believe that Section 403 dealing as it does with structural safety has no application in this instance.

You wish us to advise you as to your proper action in view of the above stated facts.

Section 1532 of The Chicago Municipal Code of 1922 provides that:

"any building, structure, enclosure, place or premises *perilous* to life or property by reason of the nature, condition or quantity of its contents or its use * * * is hereby declared to be a nuisance * * *, and the chief of fire prevention and public safety is empowered and directed to cause any such nuisance to be abated."

It is well to take into consideration in connection with Section 1532, Paragraph (b) of Section 1276 which is in part as follows:

"In case it is found that any * * * building, structure or place, or its contents, or any appliance or equipment thereof is in such condition as to be the probable cause of fire or as likely to *endanger* life or safety in case of fire * * * the chief of fire prevention and public safety shall give notice in writing to the owner, occupant, lessee or person in possession, charge or control of such building, structure or place, to make such changes, alterations or repairs, or to perform such work or to take such action, as the provisions of this chapter or the safety of any person or persons in or about any

*such building, structure or place in case of fire, panic or other accident may require. * * *."*

In view of the fact that you state that the building is a "grave fire menace" and would no doubt in case of a fire cause great loss of life among the occupants, the building may, in our opinion, be considered a nuisance and as such may be dealt with accordingly.

In the case of *Patterson v. Johnson*, 214 Ill., page 481, the court, quoting Woods Law of Nuisance, Section 109, declares:

"While a man has a right to follow his own tastes and inclinations as to the style and character of the building that he will erect upon his own land, yet he has no right to erect and maintain there a building that is dangerous by reason of the materials used in or the manner of its construction, or that is inherently weak or in a ruinous condition and liable to fall and do injury to an adjoining owner or the public. Such a building on a public street is a public nuisance, and is a private nuisance to those owning property adjoining it."

The following language in the case of *Baumgartner v. Hasty*, 100 Ind. 575, is also quoted in the *Patterson* case:

"A wooden building is not in itself a nuisance, but when erected in a place prohibited by law and where it endangers the safety of adjoining property, it may become a nuisance. *If the locality and character of such a building do endanger the safety of surrounding buildings, then it may be treated as a nuisance. * * *."*

We are mindful of the language in the case of *Masonic Fraternity Association v. The City of Chicago*, 131 Ill. App., page 1, which is often cited for this proposition, that in order to attain additional safety from fire a city is without power to order the reconstruction of a building not used for public purposes as are theatres, public concert halls, etc., where such building when completed complied with all existing ordinances and regulations, but the court time and again declares

in this case "that the building before them for consideration is *absolutely fireproof and safe.*"

Our opinion, therefore, predicated on the above and with the assumption that you have definitely and conclusively determined that the building, as in its present condition even though presumably and seemingly complying with the provisions of the ordinances in the building code, "constitutes a grave fire menace, and in the event of a fire making a little progress before discovery, there would no doubt be a great loss of life among the occupants" that the building is a nuisance within the meaning of Section 1532 of The Chicago Municipal Code of 1922.

We suggest that you advise the Fire Commissioner of the facts surrounding your conclusions predicated upon your thorough investigation that the building is perilous to life and property by reason of its condition and use, so that he may take such action as he believes will abate this nuisance.

Very truly yours,

BARNET HODES,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Taxicabs Upholstered With Velour.

July 27, 1926.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

Your letter of July 24, 1926, addressed to Francis X. Busch, Corporation Counsel, has been referred to the writer. You ask this office the following question:

“Will you kindly give an opinion as to whether or not license could be refused for the operation of taxicabs trimmed with velour.”

Section 3915 of Article 1, Chapter LXXXV of The Municipal Code of Chicago of 1922, creates the Public Vehicle License Commission.

Sections 3916 and 3917 designate the powers and duties of the Commission:

“It shall be the duty of the public vehicle license commission to make such investigations as may be necessary for the purpose of licensing and inspecting public vehicles, to conduct the examination of applicants for licenses to drive vehicles and make recommendations as to the licensing of said drivers, and to make all necessary rules and regulations for the proper enforcement of the provisions of ordinances relating to public vehicles and for the protection of patrons of all such public vehicles.”

“Section 3917. *Licensing of Public Vehicles.*) No public vehicle shall operate for hire upon the streets of the city without first obtaining a license as herein provided for. All such licenses shall be issued as of January 1, and shall expire on December 31 next succeeding, unless sooner suspended or revoked as provided for by this ordinance.

Applications for licenses for public vehicles shall be made by the owner upon blanks to be furnished by the public vehicle license commission, and such application shall contain the full name and address of the owner, the class of the vehicle for which a license is desired, the length of time the vehicle has been in use, the number of persons it is capable of carrying, and, if a motor-driven vehicle, the motor power thereof. No public passenger vehicle shall be licensed until it has been thoroughly and carefully inspected and examined and found to be in thoroughly safe condition for the transportation of passengers, clean, fit, of good appearance and well painted and varnished. The said commission shall cause such examination and inspection to be made before issuing a license, and shall recommend the refusal of a license to any vehicle found to be unfit or unsuited for public patronage. The public vehicle license commission is hereby authorized and empowered to establish reasonable rules

and regulations for the inspection of public vehicles and their appurtenances, construction and condition of fitness. If upon inspection a public vehicle is found to be of lawful construction and in proper condition in accordance with the provisions of this ordinance, upon payment of the license fee hereinafter set forth, the same shall be licensed by the mayor upon payment of the license fee as hereinafter provided, and when so licensed there shall be delivered to the owner in addition to the license a card of such size and form as may be prescribed by the commission. The card shall contain the official license number of the vehicle, together with the date of the inspection of the same and a statement with the effect that in case of any complaint the commission shall be notified and the license number of the vehicle shall be reported. Such card shall be signed by the chairman of the commission and shall contain blank spaces upon which an entry shall be made of the date of every inspection of the vehicle by the inspector. License cards shall be of a distinctly different color each year, and shall contain the name of the person, firm or corporation owning such vehicle, and in case of public vehicles driven by mechanical power, the license number assigned hereunder shall in each case be the same as that assigned to the vehicle for that year pursuant to law. * * *.”

It is plainly evident that the ordinances relating to the operation of taxicabs on the streets of Chicago for hire were enacted for the purpose of protecting the health, morals, safety and comfort of the patrons of such taxicabs.

You will note that in Section 3917, above quoted, it is specifically provided that “* * * No public passenger vehicle shall be licensed until it has been thoroughly and carefully inspected and examined and found to be in a thoroughly *safe* condition for the transportation of passengers, *clean, fit*, of good appearance and well painted and varnished. The said Commission shall cause such examination and inspection to be made before issuing a license, and shall recommend the refusal of a license to any vehicle found to be unfit or unsuited for public patronage. * * *.”

Taxicabs are used very extensively for conveying the sick and injured to hospitals, and it becomes necessary to

wash and clean the interior of the cab more frequently than the exterior by virtue of the fact that the interior is more liable to retain disease germs. Any material other than one with a smooth, durable surface, as now being used, would be more difficult to keep clean and sanitary, from the fact that it could not be washed as frequently and that a vacuum cleaning is not as sanitary as a wash.

The many other uses that taxicabs are engaged for and the practice of patrons putting their feet on the seats and causing to be left thereon mud and dirt, must be taken into consideration in passing upon the *safety* and fitness of the cab for the protection of patrons using such vehicles.

The question then that naturally presents itself is whether or not any material other than a material with a smooth surface would be proper material to use for the upholstering of taxicabs. The Health Commissioner of the City of Chicago holds that to permit a change from the present practice of having all taxicabs upholstered with a smooth, durable material would only add another means for carrying and secreting disease germs, causing infections that may produce an epidemic.

We hold, therefore, that you could and should refuse a license for the operation of taxicabs when such taxicabs are lined or trimmed with velour or any cloth material.

Respectfully submitted,

JAMES I. McCARTHY,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Distribution of Death Benefit of Patrolman.

July 28, 1926.

HON. LOUIS E. GOSSELIN, Deputy Comptroller.

Dear Sir:

In your communication addressed to the Corporation Counsel with reference to the proposed issuance of a voucher to the widow of Michael A. Madigan, a patrolman who lost his life in the performance of his duties, you state:

“This patrolman’s widow would be entitled to \$5,000 in her own right and apparently receives an additional \$2,500 in consideration of an unborn child.

Will you kindly advise with return of this voucher, whether legal cognizance can be taken of an unborn child’s status in this behalf.”

The ordinance involved in this matter is the amendment of January 16, 1926 (Council Proceedings, page 2152), amending Chapter LXII of The Chicago Municipal Code of 1922, and provides in part as follows:

“3132. *Payments—How made.*) Payments made under the terms of this ordinance shall be in accordance with said Act of the General Assembly, as amended, above set forth, and as follows: * * *

(b) \$7,500.00 for the use and benefit in equal parts of the surviving widow and one minor child of the deceased. * * *

The question of the legality of the proposed payment for the use and benefit of an unborn child is directly involved and necessitates a consideration of the rights, if any, of such unborn child, under the provisions of the foregoing ordinance.

An infant *en ventre sa mere* is supposed, in law, to be born for many purposes. It is capable of having a legacy or a surrender of a copy-hold estate made to it. It may have a guard-

ian assigned to it, and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were actually born. (*Thellusson v. Woodford*, 4 Ves. 227; 1 Blackstone's Com. 130).

In the case of *Phillips v. Herron*, 45 N. E. Rep. 72, it was held that a child quick *in utero* is a person in being.

Life is the immediate gift of God—a right inherent by nature in every individual; and it begins, in contemplation of law, as soon as the infant is able to stir in its mother's womb. (1 Blackstone's Com. 130).

In the case of *Allaire v. St. Luke's Hospital*, 184 Ill. 359, it was held that an action does not lie to recover damages for an injury to the plaintiff *while in his mother's womb*, since the right is not given by statute, and the courts of common law, while indulging the legal fiction that *an unborn child may be regarded as in esse for some purposes, when for its benefit*, have never gone to the extent of sustaining an action by an infant for injuries occasioned before its birth.

The payment of the sum of \$5,000 should be made to the widow at this time and in view of the doctrine enunciated in the foregoing cases and authorities, I am of the opinion that the payment of the further sum of \$2,500 for the benefit and use of the child should be made if and when said child shall have been born alive within the period of gestation.

I return herewith the death certificate, correspondence and original voucher for the sum of \$7,500.

Respectfully submitted,

ROY S. GASKILL,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Alteration of Building Containing Department Store.

July 29, 1926.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.

Dear Sir:

This will acknowledge receipt of your communication of the 26th instant accompanied by plan showing proposed alteration to the department store of Atkins & Freund, 4805-11 South Ashland avenue.

You advise us that the said department store has been in use for many years previous hereto; that because of the widening of Ashland boulevard it is necessary to cut 15 feet off the front of the building; that the owners of the store in question propose to erect a new front on their store and construct a 91 foot 2 inch addition to the rear end of the building; that you refused to approve the plans unless mechanical ventilation is installed as required for buildings of class VII; that the owners submitting the plans insist that they should not be obliged to install a mechanical ventilation system, inasmuch as their building was erected and put to the use of class VII prior to the passage of the ordinance requiring the installation of mechanical ventilation in buildings of this character.

You desire our opinion as to whether or not the building, in view of the 91 foot 2 inch addition to the rear end of the building, should comply with the existing ordinances and whether there should be installed mechanical ventilation as required for buildings of class VII.

Section 681 of The Chicago Municipal Code of 1922 defines class VII buildings as:

“In Class VII shall be included every building used for the sale at retail of dry goods and other articles of general merchandise and commonly known and described as a department store.”

There is no controversy over the fact that the building in question is a department store building.

Paragraph (b) of Section 2153 of The Chicago Municipal Code is as follows:

“(b) In buildings of Class VII hereafter erected, on floors frequented by the public, the air in such rooms shall be supplied at the following rates:

For each person in basement, two thousand cubic feet per hour.

For each person in first to third stories, both inclusive, fifteen hundred cubic feet per hour.

For each person in fourth story and above, except as hereinafter provided, thirteen hundred cubic feet per hour;”

and Paragraph (c) provides rules for the determination of the number of people on any floor in buildings of class VII.

Paragraph (g) is as follows:

“(g) The air in any rooms and floors in buildings of Class VII erected prior to March 13, 1911, shall be supplied, by mechanical or other means, at the following rates:

For each person in basement, sixteen hundred cubic feet per hour.

For each person in first to third stories, both inclusive, twelve hundred cubic feet per hour.

For each person in fourth story and above, except as hereinafter provided, ten hundred and forty cubic feet per hour.

For each person in grocery departments and restaurants, twelve hundred cubic feet per hour.”

Paragraph (h) like Paragraph (b) provides rules for the determination of the number of people on any floor in buildings of class VII.

A comparison of Paragraphs (b) and (g) indicates that the basement of buildings of class VII erected prior to March 13, 1911, permits supplying by mechanical or other means, four hundred cubic feet of air per hour per person less than is required of buildings erected subsequent to March 13, 1911, and similar substantial differences occur in reference to the

supply of air per hour for each person in the other stories of the building.

Presumably the owner of the department store, the plans of which are now up for consideration, believes that he should not be compelled to supply an increase of air per person in the rooms and floors of his building consistent with the provisions of Paragraph (g) of Section 2153.

The plans submitted indicate that the original building was 117 feet 7 inches in length. The building will be 102 feet 7 inches in length because of the widening of Ashland boulevard. Consequently, the owner's position is practically that he believes he is entitled to maintain because of the action of the city authorities in widening Ashland boulevard, a building 193'9" in length instead of a building 117'7" in length without supplying by mechanical or other means air in the rooms and floors as provided by Paragraph (b) of Section 2153. The plans virtually indicate that the floor space of the structure is to be doubled by the erection of the new addition.

It is our opinion because of these facts, that the position of the owner of the department store in question is untenable in that in our belief Paragraph (g) of Section 2153 is not susceptible of the interpretation presented by the owners of the department store.

It is therefore our opinion that under the provisions of Section 725 of The Chicago Municipal Code the proposed structure should comply with the present existing ordinances and install mechanical ventilation as now required for buildings of class VII.

We are herewith returning the plan that you submitted to us.

Very truly yours,

BARNET HODES,

Approved:

Assistant Corporation Counsel.

FRANCIS X. BUSCH,

Corporation Counsel.

Installation of Gasoline, Kerosene and Fuel Oil Tanks.

July 29, 1926.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

This will acknowledge receipt of your communication of the 16th instant with Exhibits A to F inclusive directed to this department.

You advise us that on March 11, 1926, application was made by John S., Henry C., and Howard Phipps, trustees, under the trust agreement of the Phipps Industrial Land Trust by Newton F. Croy, agent, to your Bureau to install 15 tanks to contain 17,000 gallons each of naphtha, gasoline, kerosene and fuel oil for a bulk oil station at the premises known as Nos. 2601-2641 North Keeler avenue; that the application of March 11th was supplanted by another application by the same applicant dated April 15, 1926, for 24 tanks each of a capacity of 11,750 gallons; that in conjunction with the application to your department there was presented an alleged frontage consent petition presumably evidencing that the consents of property owners, as required by ordinance, to install the tanks in question had been obtained; that the frontage consent petition was submitted to the Superintendent of Maps for verification and report, and that you were advised on May 27, 1926, by the Bureau of Maps and Plats that the total property frontage to be considered was 1,449.21 feet, the majority of which is 724.61 feet; that the total frontage obtained by the applicant for the permit was 1,253.69 feet, in other words the frontage consent petitions present a surplus of 529.08 feet; that after you had satisfied yourself that the premises upon which the tanks were to be installed conformed to the Zoning Ordinance in so far as location was concerned, you issued Permit No. 13424 granting

authority to install the tanks as requested in the permit application of April 15th.

You further advise us that subsequent to the issuance of the permit you received a communication from the North West Manufacturers Club dated July 13, 1926, protesting against the erection of the bulk station upon the premises in question, and further a letter from Louis W. Reinecker, Jr., of the same date advising you that he represents certain property owners in the immediate vicinity of 2601-2641 North Keeler avenue, and that he, with Alderman Frank R. Ringa, had called upon Mr. John Plant, Chief Fire Prevention Engineer, and protested against the erection of the bulk oil and gasoline station in question previous to the issuance of the permit, basing objections and protest upon two facts.

First. That although the application of April 15, 1926, filed with your department to install the tanks declared that the installation would be upon the "premises known as Nos. 2607-2641 North Keeler avenue, and described as follows: Lot 15, *except the south 70 feet* owners division of Healy Industrial District, etc." That as an actuality the installation was not confined to lot 15 "except the south 70 feet" but work was in reality being done upon the "south 70 feet" as well as the remainder of lot 15.

Mr. Reinecker's letter to you indicates that excepting the 70 feet from lot 15 in the application for a permit was merely a subterfuge, Paragraph 3 of Mr. Reinecker's letter being in part as follows:

"Lot 15 has a frontage on North Keeler Avenue of 435.12 feet and 291.09 feet on Wrightwood Avenue, and the Chicago, Milwaukee and St. Paul have a switch track bounding said property on the east in a diagonal line. The original application as mentioned covers the entire lot and after the same was refused and apparently after parties interested in the erection of a bulk oil and gasoline station were unable to obtain the necessary frontage consents they made their second application for a permit under date of April 15, 1926, excepting from said lot the south 70 feet, thereby preventing the owners of property on the south side of Wrightwood Avenue from having

any voice in the erection of the plant or the issuing of a permit."

It is obvious from the above that your department should not permit installations or work in connection with these tanks upon the south 70 feet of lot 15 unless and until the property owners as provided by ordinance consent to work being done upon this parcel of property.

Second. Section 2279, Paragraph B of The Municipal Code of 1922 is in part as follows:

"It shall be unlawful to install any tank or tanks for the storage of any of the liquids mentioned in Section 2277 in any lot or plot of ground without first obtaining the written consents of the property owners representing the majority of the total frontage in feet of any lot or plot of ground lying wholly or in part within lines 150 feet distant from and parallel to the boundaries of a lot * * *."

The affidavits submitted to you by William H. Odlum, treasurer of the Kelyvn Park Building Corporation; Joseph A. Klein, Jr., vice-president of Mathies, Klein & Sons; Charles E. Larson; and James W. Barrett, Jr., president of the Crown Dye & Tool Company; indicate that the Phipps Estate by its proper officers has given its consent to the installation of the tanks as the owner of the property of lots 13, 16, 18, 19, 20, 21, 22 and 23. These lots are all immediately within 150 feet distant from lot 15. Lots 24 and 25, the owners of which also object to the installation of the tanks, are not to be considered because they do not come within the 150 foot radius. The fact, however, as it appears to us is that lots 13, 16, 18, 19, 20, 21, 22 and 23 have been sold under contract to the individuals and organizations who have submitted the above affidavits and who are actually on the premises exercising ownership. These individuals, by their sworn affidavits, declare that they have the "use, control and occupation of the land with claim of ownership" in each instance and that their consents to the installation of the tanks have not been obtained.

To determine whether these individuals who are actually on premises within 150 feet distant from lot 15 to the east, north and west, should have a voice in the question of frontage consents necessitates a determination as to what the phrase "property owners representing a majority of the total frontage" means, as only "property owners representing the majority of the total frontage" have the right under the provisions of Section 2279 to consent or refuse to consent to the installation of a tank or tanks.

In the case of the *People v. Village of Lombard*, 319 Ill., page 57, the phrase "property owners" is given a judicial interpretation by our Supreme Court, the court stating:

"When the term 'property owner' is used without restriction it includes both general and special owners. (*Hartford v. Brady*, 114 Mass. 466; *Hull v. Sangamon River Drainage District*, 219 Ill. 454; *Coombs v. People*, 198 id. 586; *Cheisa v. Des Moines*, 158 Iowa 343).

The word 'owner' has been defined to include anyone who has the use, control or occupation of the land with claim of ownership, whether his interest be in absolute fee or a less estate. (*Fort Dearborn Lodge v. Klein*, 115 Ill. 177, etc.)."

Although our Supreme Court has seemingly intimated repeatedly that the word "owner" means a fee simple interest in the land (*Merritt v. Kewanee*, 171 Ill. 551; *Wright v. Bennett*, 3 Scam. 459) the *Lombard* case above quoted explicitly indicates a departure from the inference of an owner necessarily having the absolute fee simple interest in the land. It is readily perceivable that if the term "property owner" is to be interpreted as meaning owners of equitable interest, cases might arise in which it possibly would be difficult to draw a clear line of demarcation between the various kinds of equitable interest in land. Because of this possible flexibility of the definitional significance of the phrase "property owner" it is necessary to determine the conclusion in each case upon its own peculiar state of facts.

However, in the *Lombard* case, the court states that the word "owner" includes anyone who has the use, control or occupation of the land with claim of ownership.

It is our belief that the court intends the word "owner" in each case to apply only where this trinity of interest occurs: 1. Use; 2. Control or occupation; 3. Claim of ownership; and that it is not sufficient for an owner merely to have the use of land or the control of the land or the claim of ownership of the land to establish his right as a "property owner." There must be the combined situation of use, control or occupation with the claim of ownership before he becomes an owner within the intendment of "property owner" regardless of whether the interest be an absolute fee or a less estate.

It is manifest from the language in the *Lombard* case above quoted that the individuals holding contracts of purchase to lots 13, 16, 18, 19, 20, 21, 22 and 23 and being actually and having "the use, control or occupation of the land with claim of ownership" are "property owners" within the provisions of Paragraph (b) of Section 2279 of The Municipal Code, and being such "property owners" it is necessary for the applicants who desire to install the tanks upon the premises in question to obtain frontage consents from them.

We are cognizant of the fact that there is considerable merit in the contention that your department should not be compelled in each instance to cause an investigation to be made as to what the actual interest of equitable owners are, and an iron-clad rule that you should only interest yourself in who the fee simple owner is would obviate this sort of difficulty. However, a hard and fast rule of this character would work palpable injury and hardship and would, in many instances, be inequitable and unjust. It is not uncommon for the owner of a parcel of property to sell by contracts the property, retaining merely a naked legal title and still exercise—although he does not in the present nor will not have in the future, the use, control and occupation of the land—such powers as signing frontage consent petitions that may possibly work irreparable damage and hardship and financial loss to those who should truly be considered property owners.

It is therefore our opinion that the consents for lots 13, 16, 21, 22 and 23 submitted by John S., Henry C. and Howard Phipps, trustees under the Phipps Industrial Land Trust, by Newton E. Croy, agent, be rejected. If with the rejection of this frontage the applicant does not have the necessary frontage as provided by ordinance, it is our suggestion that permit No. 13424 permitting the installation of 24 tanks each of a capacity of 11,750 gallons on the premises known as 2607-2641 be revoked as it was issued improvidently in that the necessary frontage consents of the individuals having the "use, control or occupation of the land" with claim of ownership—the property owners of certain necessary property "lying wholly or in part within lines 150 feet distant from and parallel to the boundaries" of lot 15—had not been obtained as required by ordinance.

We are herewith returning the exhibits that you have placed before us.

Very truly yours,

BARNET HODES,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

**Sale of Real Estate Owned by City and Acceptance of
Perpetual Easement for Housing of Branch
Fire Department.**

July 30, 1926.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

We have your communication of May 25, 1926, to which was attached a letter from James T. Iggoe, submitting to you

the proposition that he, Mr. Igoe, purchase from the City of Chicago for the sum of One Dollar (\$1.00), the fee simple, of all the property known as 326-328 South Jefferson street, and to sell back to the City of Chicago for the sum of One Dollar (\$1.00) permanent quarters on the street floor, at the above stated address, for the housing of the Fire Department, two companies including the Battalion Chief's two rooms and the District Marshal's two rooms. The latter further states that said quarters will meet the Fire Department's requirements in every respect and will include steam heat during the entire twenty-four hours each day of the winter season, also hot and cold water.

The statute giving the City a right to sell its real estate we find under the Cities and Villages Act, Chapter 24, Paragraphs 512 and 513, Smith-Hurd Illinois Revised Statutes, 1925, page 401, as follows:

"512. *Sale must be approved by three-fourths vote.*) §1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That any city or village incorporated under any general or special law of this State, which shall have acquired or hold any real estate for any purpose whatsoever, is hereby authorized and empowered by ordinance passed by three-fourths of the members of the city council of any such city, or of the board of trustees of any such village, at any regular meeting or at any special meeting called for such purpose, to sell such property when the same shall, in the opinion of such majority of such city council or board of trustees, be no longer necessary, appropriate or required for the use of such City or village, or profitable to, or its longer retention be for the best interests of such city or village.

513. *Requirements of ordinance.* §2. Such ordinance shall specify the location of such real estate, and the use thereof, and before any sale shall be made under or by virtue of any such ordinance, by the city council of any such city, or the board of trustees of any such village, such proposal to sell shall be published in one of its daily or weekly papers once each week for four successive weeks, the first publication to be not less than thirty days before the day provided in said notice for the opening of bids for said property. Such notice shall contain

an accurate description of such property, the purpose for which it is used, and at what meeting the bids will be considered and opened, and shall advertise for bids therefor. All such bids shall be opened only at a regular meeting of such city council or board of trustees, and shall be accepted only upon a vote of three-fourths of the members of such city council or board of trustees: Provided, however, that the city council or board of trustees may, by a majority vote, reject any and all bids. (As amended by act filed July 7, 1923, L. 1923, page 260.)

It would seem that the spirit of the statute is not in favor of having a city dispose of its real estate, unless, in the opinion of the City Council, said real estate is no longer necessary, appropriate or required for the use of the City, or profitable to, or its longer retention be for the best interests of the City. If the City Council is of said opinion it is authorized to sell said real estate by three-fourths ($\frac{3}{4}$) vote. Paragraph 513 provides by what means and in what manner the City should proceed to sell real estate. Said section does not authorize the conditional sale as proposed in the letter from Mr. Igoe. Furthermore, according to the provisions of the statute it is necessary that this property be advertised for sale, and, after advertising, the bids must be opened by the City Council.

To have the City own a perpetual easement or fee to, or in, several rooms in a piece of property that has other permanent improvements owned by other parties may cause the City great inconveniences, e. g., under outside judgments, taxes, possible destruction by fire, cyclones, alterations and in numerous other manners.

It is our opinion that under the present existing law and constitutional provisions it would be difficult for the City to enter into the proposed arrangement.

Yours truly,

FRANK T. HUENING,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Powers of Attorney to Receive Pension Checks.

July 31, 1926.

RETIREMENT BOARD, POLICEMEN'S ANNUITY & BENEFIT FUND.

Gentlemen :

Replying to your request of July 20th for an opinion as to permitting pensioners to execute a power of attorney authorizing some other person or persons to receive and endorse pension checks, the following is submitted :

Section 58 of the Policemen's Annuity and Benefit Fund Act contains the following provision :

“No such annuitant or other beneficiary shall have any right to transfer or assign his or her annuity or disability benefit or any part thereof either by way of mortgage or otherwise.”

The execution of a power of attorney to receive and endorse a pension or disability check is virtually a transfer or assignment of that check, and as such transfer or assignment of the check could easily and readily be taken advantage of to collect and retain the money represented by the check, your Honorable Body should exercise great caution in accepting or acting upon any power of attorney of that manner. There may be instances where a beneficiary is unable to write, either through illness or lack of education, and in such a case your Honorable Body should require that the beneficiary personally sign the check with a mark duly witnessed.

Should a case arise in which a beneficiary intends to be absent from the City and desires that the pension, annuity or other benefit should be used for the support of the members of the family of the beneficiary, I can see no objection to such beneficiary being permitted to execute a power of attorney authorizing some member of his or her immediate family to

receive, endorse and collect the pension, annuity or disability check, but this should be done only after your Honorable Body is fully satisfied as to the facts in each particular case.

I am of the opinion that powers of attorney executed by beneficiaries to any person other than the members of the beneficiaries' families should not be recognized by your Honorable Body.

Yours respectfully,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Provisional Captains of Police.

August 2, 1926.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

We have your official request for an opinion on the ordinance adopted by the City Council on June 30, 1926, which involves the construction to be placed upon that ordinance.

In order that our opinion may be complete we set out first a copy of the ordinance which is as follows:

“AN ORDINANCE

Creating the position of provisional captain in the Department of Police.

Be it ordained by the City Council of the City of Chicago:

Section 1. That Section 3065 of The Chicago Municipal Code of 1922, as amended, be and the same is hereby further amended by inserting the words ‘pro-

visional captains,' after the word 'captains'; also that Section 3066 of said Code, as amended, be and the same is hereby further amended by inserting the words 'provisional captains' after the word 'captains'; also that Section 3067 of said Code, as amended, be and the same is hereby further amended by inserting the words 'provisional captains' after the word 'captain.'

Section 2. The provisional captains in the Department of Police shall be appointed according to law, and it shall be the duty of such provisional captains to perform the duties of lieutenants of police at all times except when they are temporarily acting as captains of police. They shall act as captains of police whenever by reason of a vacancy, absence or disability, any position of captain is temporarily unoccupied, and upon the return of the regular occupant of the position of captain to his duties, such provisional captain occupying the place shall again perform the duties of lieutenant.

Section 3. This ordinance shall take effect and be in force from and after its passage and approval."

Section 3 of the Civil Service Act makes it the duty of the Civil Service Commissioners to classify all the offices and places of employment with reference to the examination thereafter provided for. This ordinance in express terms "creates the position of provisional captain in the Department of Police." According to the Civil Service Act and the existing rules of the Commission the classification of the position of provisional captain must be from rank to rank, except as otherwise provided, in the same line of service (*The People ex rel. v. Errant*, 229 Ill. 56).

It is obvious from the plain language of the ordinance that it was the intention of the City Council to create a promotional position between those of existing lieutenants and captains of police, in the active police duty. That the new position as defined by the ordinance is one which must rank higher in the line of active police duty than lieutenant is indicated first by the provision for a higher salary than that of lieutenant and the provision for new and additional duties in the new position. That the new position is lower than that of captain is also apparent from the provision in the ordinance

that "such provisional captains (shall) perform the duties of lieutenants of police at all times except when they are temporarily acting as captains of police."

It is our opinion based upon the decisions of the Supreme Court, particularly the decision in the *Errant* case, *supra*, that the new position must be classified as in a grade or rank next above that of lieutenant of police and next below that of captain of police.

All the positions of lieutenant, provisional captain and captain must be filled by promotional examinations and the certifications of eligibles taken from the respective lists obtained from these examinations in the new line of service created by this ordinance. The lieutenants are now eligible to promotion only to the next higher position in rank, namely, that of provisional captain. The provisional captains alone are eligible for promotion to the position of captain. An eligible list from which to select an appointee to the new position of provisional captain must be made from an examination of lieutenants. An eligible list from which to select an appointee to the position of captain must be made from an examination of provisional captains.

If an eligible list already exists as the result of an examination of lieutenants heretofore eligible to the position of captain, such list must now constitute the list from which the new positions of five (5) provisional captains must be filled. There is no vested right to any public office. In the case of existing lieutenants of police, their right to such office and to promotion to the higher positions was subject at all times to the power of the City Council, not only to abolish such office and to modify its prescribed duties, but to change the right of such lieutenants from promotion to the captain's position to that of provisional captain, which now takes the place of the captain's position as the next position higher in rank than that of lieutenant. An existing eligible list obtained from an examination of the lieutenants to fill the then existing next higher position of captain would not give the lieutenants any vested right to promotion to such position of captain. Their

right never was more than the right to fill the next higher position in rank as it might be thereafter created and exist at the time it was to be filled. Therefore, the new position which the Council has created by this ordinance and which, in our opinion, must necessarily be graded as in the next higher rank, makes their right to promotion apply to the new position of provisional captain instead of the old position of captain.

The new positions of provisional captains, therefore, must be filled by certification from the present eligible list of lieutenants in the manner prescribed by Section 10 of the Civil Service Act, and Section 1 of Rule 4 of the Civil Service Commission, and the vacancies thereby created in the position of lieutenant must be filled in like manner from the eligible list from those in the next lower rank in the service.

Hereafter the position of captain must be filled from an eligible list obtained from an examination of the provisional captains, an examination limited to them exclusively as being in the next lower rank in the same line of service as the captain. And the position of captain must be filled in like manner as indicated for the filling of positions of provisional captains and lieutenants.

The latter portion of our opinion fully answers your first query, namely, "If they accept the position as provisional captain, being certified from the eligible list for captains of police, would it then be necessary for them to take a new examination to be appointed to the position of regular captains in the Department?"

The second query is as follows: "Would the lieutenants on the list below them, in case of a regular captain's vacancy, have the right to demand that they be certified to the positions on the ground that the five (5) men who had been certified accepted other positions and were off the list?"

No, they would not. They could not thus be promoted above these men who always were higher than they on the list of eligibility to promotion. The rights of these five (5) men, filling the position of provisional captains to promotion to

the captaincy remain paramount to lieutenants who were lower on the list of eligibility than they for the position of captain. These five (5) men first on the present eligible list continue as against the lieutenants below them on such lists to be first entitled to promotion to any vacancies in the captaincy and their promotion in the meantime to that of provisional captain only strengthens their greater right to promotion to the captain's position and in no view of civil service procedure can these five (5) provisional captains be said to have lost their rights to the captaincy to any lieutenants lower on the eligible list than they.

Respectfully submitted,

FRANCIS J. VURPILLAT,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Illuminated Sign Projecting Over Sidewalk.

August 2, 1926.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

This will acknowledge receipt of your communication of July 28, 1926, in which you enclose a letter from Albert E. Fisk, structural engineer for the Lu-Mi-Nous Signs, Inc., which letter of Mr. Fisk's accompanied an application for the approval of a plan and permission to erect an illuminated sign at the Covent Garden Theatre, 2653 North Clark street.

You inform us that the sign proposed to be erected is to be about six feet wide and fifty-seven feet in height and is to be placed over the public sidewalk perpendicular to the

face of the building, the lettering and other matter being exposed to the view of the people passing up and down the street; the top of the sign will be fifty feet higher than the roof of the building. The bottom of the sign will be about seven feet lower than the roof of the building; the sign is to be supported by outrigger beams, some of which are placed on the roof of the building and others immediately below the roof surface of the building.

Your Department has refused to issue a permit for the erection of this sign because of the fact that the top of the sign is higher than the roof of the building, and consequently, in your opinion, does not comply with the provisions of Section 919 of The Chicago Municipal Code of 1922, which provides that no signs erected "upon or over" the roof of any building "shall be constructed closer than six feet from the edge of the roof of the building or structure upon which same is erected."

Mr. Fisk, in his letter to you, states that the plans for the erection of this sign have been submitted to your Department, examined by your engineers, and that the verbal assertion was made to the applicant that the sign is structurally safe, that if the sign is to be considered a projecting sign it complies strictly and completely with all of the ordinances of the City, and that because the sign does not extend over the roof, it cannot be considered a roof sign. There is no seeming controversy over the fact that the sign in question is wholly over the street, being connected to the building only by its structural supports, and further, as we have stated, that the sign is structurally safe.

Therefore, the only point of contention is as to whether the sign is a roof sign or a projecting sign. If it is to be considered as a projecting sign the plans comply fully with the provisions of the ordinances in reference to signs. If it is to be considered a roof sign it must be placed six feet back of the front wall of the building.

You also advise us in your letter that you "feel that any sign attached to a building either flat against the face of the

building or perpendicular to the face of the building that extends in whole or in part above the roof of the building comes within the jurisdiction of the building department * * *."

Your argument in support of this contention is:

"That if a sign such as this can be erected extending 50 feet above the roof of the building and supported by the roof or by the walls of the building it will be possible by a slight change in design to erect illuminated roof signs either flat against the face of the building extending partly above the same or supported on outrigger beams at varying distances beyond the face of the building and that the provisions of Section 919 of the building ordinances will be unenforceable."

Section 919 of The Chicago Municipal Code of 1922 states that:

"(a) Illuminated and other roof signs *regulated by this section* shall be defined as signs constructed, erected and maintained *upon or over* the roof of any building * * *.

(b) * * * No such sign hereafter erected shall be constructed closer than six feet from the edge of the roof of the building or structure upon which same is erected."

Section 919 specifically states that the signs to be regulated by its provisions are those which are "constructed, erected and maintained upon or over the roof of any building." If the sign is erected upon or over the roof of the building, then it must comply with Paragraph (b) of Section 919, but if the sign is not upon or over the roof of the building, then your department is not concerned, as supervision concerning the erection and maintenance of projecting signs are provided for in other ordinances enforced by the Department of Gas and Electricity.

In the case of *I. C. R. R. Co. v. City of Chicago*, 141 Ill. 586, at page 598, the court, in giving Webster's definition for certain words, states:

“He defines the word, ‘over,’ as follows: ‘Above, or higher than, in place or position, with the idea of covering; across; from side to side of; upon the surface of.’”

The sign in question is wholly “over” the street. At no place, point or position, is it “across” the roof, or “upon the surface of” the roof or “above or higher than, in place or position with the idea of covering” the roof.

Obviously, therefore, the sign in question is not within the meaning of the provision of Section 919 which speaks about a sign upon or over the roof of a building.

We are satisfied from what you have placed before us that the sign being wholly over the street cannot be said to be “*upon*” the roof of any building.

We cannot understand how it is possible “by a slight change in design” to circumvent the provisions of Section 919 because if the sign is physically “upon or over” the roof of the building, it is governed by Section 919. If it is not “upon or over” the roof of the building, it does not come within the provisions of Section 919.

In reference to your attitude concerning your jurisdiction of any sign attached to a building extending in whole or in part above the roof of the building, we must state that if the sign is maintained, constructed or erected *upon or over* the roof of the building it is a sign governed by the provisions of Section 919 and concerns the jurisdiction of your Department.

It is therefore our opinion, in view of the above, that the illuminated sign to be erected at the Covent Garden Theatre not being a sign “upon or over” the roof of any building, but being rather a projecting sign, is not governed by the provisions of Section 919.

Very truly yours,

BARNET HODES,

Approved:

Assistant Corporation Counsel.

FRANCIS X. BUSCH,

Corporation Counsel.

Pay Checks Which Contain No Warrant Number.

August 2, 1926.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

Your letter concerning the proposed elimination of the warrant number from pay checks for City employees was referred to the writer for consideration and reply. The question you ask is whether such warrant number may be legally omitted from pay checks.

There is nothing in either the statutes or the ordinances of the City which requires any form of pay check or makes any requirement concerning same if used. There are certain statutory requirements concerning warrants which must be observed, notably those contained in Sections 8 and 11 of Article VII of the Cities and Villages Act. We understand these formalities are observed by you when a warrant for a payroll is drawn and presented to the City Treasurer. This warrant is the treasurer's authority for payment. How he pays—whether in one lump sum to the paymaster or other person designated or on checks drawn against the sum so released—is purely a matter of convenience for the parties involved.

There is no necessity for having the warrant number on the pay checks if checks are used. If the checks can be just as safely and expeditiously handled and accounted for without the number being placed on them we see no reason whatever for placing it on the checks.

Yours truly,

LEON HORNSTEIN,

First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Proposed Ordinance Requiring Ventilation of Public Telephone Booths.

August 2, 1926.

HON. BERTHOLD A. CRONSON, Alderman, 4th Ward.

Dear Sir:

Your communication of recent date, in which you request an opinion from this office as to the legality of a proposed ordinance which would require the ventilation of all public telephone booths in the City of Chicago, is at hand. In response thereto we respectfully submit the following:

The Illinois Commerce Act provides for the regulation of public utilities within the state by the Illinois Commerce Commission, and Section 10 of that act defines the term "public utility" to include all companies which "may own, control, operate, or manage, directly or indirectly for public use, any plant, equipment, or property used or to be used for or in connection with the * * * transmission of telegraph or telephone messages between points within the state." Section 49 of the act confers upon the Commerce Commission power to determine and order the "just, reasonable, safe, adequate or sufficient rules, regulations, practices, equipment, appliances, facilities, service or method" to be observed or employed by public utilities under its jurisdiction.

In *Northern Trust Co. Adm. v. Chicago Railways Co.*, 318 Ill. 402, in which the validity of an ordinance of the City of Chicago, requiring street cars to display a brightly burning electric headlight after sundown, was questioned, the Supreme Court in discussing the Illinois Commerce Act and the powers of the Illinois Commerce Commission thereunder said at page 412:

"When the first Public Utilities Act came into force, on January 1, 1914, the power of the city over the subject-matter of that act ceased to exist, and it could not thereafter pass new ordinances or enforce existing ordi-

nances with reference to matters within the exclusive jurisdiction of the Public Utilities Commission. The power to enforce proceeds from the present or existing power or authority to enact or to provide. A municipality cannot be said to possess the power to enforce an ordinance concerning a subject upon which it has lost the power to pass the ordinance. Any attempt to enforce in such a situation would be defeated by interposing the act withdrawing the municipality's power to enact. If it had been deemed wise or necessary, municipal ordinances and police regulations relating to public utilities could have been continued in force until the commission acted, by a saving provision in the act or by an order to that effect from the commission itself. But the act contains no such provision, nor does it appear that the commission made, or was asked to make, any such order. Irrespective of the question whether or not the commission had taken any action under the powers granted to it by the Public Utilities Act of 1913, the power of the City over the subject of the regulation of the equipment of public utilities ceased to exist when that act became effective, on January 1, 1914, and if the ordinance of 1911 required street cars to be equipped with brightly lighted headlights it was abrogated on that day and thenceforth became unenforceable."

It is our opinion that inasmuch as public telephone booths are the property of a public utility company and are facilities furnished by such company for the exclusive use of its patrons, any regulation of the same comes within the doctrine laid down in the *Northern Trust* case, *supra*, as to the scope of the Illinois Commerce Act. Hence, in view of the language in the *Northern Trust* case, it is our opinion that the regulation of telephone booths is no longer within the province of the City of Chicago and that any ordinance purporting so to do would be held invalid by our Supreme Court.

Respectfully submitted,

WILLIAM J. TUOHY,

Approved:

Assistant Corporation Counsel.

FRANCIS X. BUSCH,

Corporation Counsel.

Liability of City for Accident in Public Playground.

August 3, 1926.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

Enclosed are all files in the claim of the Estate of Slara Harliceek, a minor, killed in the 18th Place Playground on April 20, 1926.

In our opinion, although there are some cases to the contrary, the management and care of a public playground is a private and not a corporate function, and therefore the City is liable for injuries resulting from its negligence in caring for it.

28 Cyc., Paragraph 5, page 1311.

19 R. C. L. 407.

Denver v. Spencer, 34 Colo. 270.

Jones v. New Haven, 34 Conn. 1.

Carey v. Kansas City, 187 Mo. 715, 70 L. R. A. 65.

Barthold v. Philadelphia, 154 Pa. St. 109.

In submitting this opinion we have considered only the legal point involved and have not attempted to pass upon the question of negligence or the merits of the claim. Permit us, however, to direct your attention to the correct amount of the claim. It appears the proper total should be \$336 instead of \$398, as several items are listed in duplicate, whereas they are also included in the undertaker's bill.

Respectfully submitted,

LAWRENCE J. FENLON,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Right to Duty Disability Benefit of Employee Appointed Under Temporary Authority.

August 4, 1926.

RETIREMENT BOARD, MUNICIPAL EMPLOYEES' ANNUITY & BENEFIT FUND.

Gentlemen :

Replying to your request for an opinion as to the duty disability rights of a municipal employee appointed under temporary authority, the following is submitted :

Your letter states that Mr. Patrick Garvey, a laborer, in the Water Pipe Extension Division of the City service, was granted a temporary leave of absence as a laborer and was appointed under temporary authority as a caulker on May 21, 1925; that on May 22, 1925, while working and being paid at the caulker rate he was injured by straining himself but continued working until June 8, 1925, at which time he was given his vacation until June 20, 1925, and paid as a caulker; that on August 8, 1925, Mr. Garvey filed an application for duty disability benefits, stating that he was injured on the job on June 8, 1925; that your Honorable Body granted Mr. Garvey ordinary disability benefits at the rate of \$2.63 per day and that he is still receiving such benefits; that Mr. Garvey made application for workmen's compensation benefits and later filed a claim with the Industrial Board; that the Industrial Board granted him workmen's compensation, and that his attorney has filed a demand for the payment of the difference between ordinary disability benefit of \$2.63 per day and duty disability benefit of \$4.32 per day as laborer, or \$6.16 per day as caulker.

Section 12 of the Municipal Employees' Annuity & Benefit Fund Act defines "municipal employee" and then says:

"This definition shall not include, and this act shall not apply to any person employed in the service of such

city or the board of education of such city by virtue of temporary appointment as defined in Section 10 of said act to regulate the Civil Service of cities."

It would be unfortunate if a municipal employee, who ordinarily would be entitled to the benefits of the act, should lose those benefits while working under temporary appointment in some department other than the division in which he is registered as a municipal employee. He is doing the same work and running the same risks as other members of the division of employment in which he is temporarily engaged, and as a matter of justice it appears that he should be given the same protection. The Supreme Court of the State of Illinois in the case of *Colton v. Trustees of the Firemen's Pension Fund of Bloomington*, 287 Ill. 56, 61, laid down the following principle of law:

"The foundation rule in construing statutes is to ascertain and give effect to the intention of the law-making body, but the intention must be that which is expressed in the statute, and the language of the statute can not be disregarded unless the court can say that the meaning is doubtful and that adherence to the letter will lead to injustice or absurdity. *The purpose of pension laws is beneficial* and statutes of that character should be liberally construed in favor of those intended to be benefited."

The meaning of Section 12 of the act appears to be doubtful, but the evident intention of the whole act indicates that the portion of Section 12 hereinabove quoted was not intended to apply to a person who was actually a "municipal employee" but who might be temporarily working in some other division of the City's service under temporary authority, but that it was intended to apply to those who have not as yet become municipal employees but are working by virtue of appointment under Section 10 of the Civil Service Act "when there is no eligible list." This construction of Section 12 appears to be the reasonable and sensible interpretation, since any other interpretation "would lead to injustice or absurdity."

I am of the opinion that any municipal employee who is a beneficiary of the Municipal Employees' Annuity and Benefit Fund, who is transferred from any one department to any other department of the City's service, under temporary appointment, and who, while serving the City under such temporary appointment, becomes disabled as the result of an injury incurred in the performance of any act or acts of duty, is entitled to be paid duty disability benefit (during any period of such disability for which such municipal employee shall not receive nor have a right to receive salary) of an amount equal to 75 per cent of his salary as it shall be at the time of such injury, in accordance with the provisions of Section 46 of the act.

Respectfully submitted,

GEORGE F. MULLIGAN,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Right of Employee of Public Library to Become a Participant in the M. E. A. & B. Fund.

August 4, 1926.

RETIREMENT BOARD, MUNICIPAL EMPLOYEES' ANNUITY & BENEFIT FUND.

Gentlemen:

Replying to your request for an opinion as to the right of an employee of the public library to become a participant in the Municipal Employees' Annuity and Benefit Fund, the following is submitted:

Section 2 of the Library Employees' Pension Fund Act gives to library employees who voluntarily accept and agree to comply with the provisions of that act the right to withdraw from participation in the fund by filing a written notice of his or her desire to so withdraw.

I am informed through the office of the secretary of the Civil Service Commission that public library employees are City employees by virtue of civil service examination; they are, therefore, eligible to become beneficiaries of the Municipal Employees' Annuity and Benefit Fund under the provisions of Section 12 of the Municipal Employees' Annuity and Benefit Fund Act.

Section 12 of the act heretofore referred to, in defining the term "municipal employee" provides, among other things, that the definition shall not include and the act shall not apply "to any employee of such City or Board of Education who shall be a participant in any annuity and benefit fund, annuity and retirement fund or any pension fund now or hereafter in operation in such City, except the annuity and benefit fund herein provided for or a municipal pension fund defined hereinafter in this section."

The Library Employees' Pension Fund Act contains no provision for any refund of contributions paid into that fund by a library employee nor for the transfer of such contributions from that fund to any other fund, but simply provides in Section 11 of that act that any employee who has been contributing to that fund and who shall be dismissed or resign from the service of the Public Library Board may, upon application within three months after the date of such dismissal or resignation, receive one-half of the total amount paid into such fund by such person.

I am of the opinion that any City employee who is a contributor to the Library Employees' Pension Fund may, upon resigning from participation in that fund, become a participant in and beneficiary of the Municipal Employees' Annuity and Benefit Fund, upon complying with the provisions of the Municipal Employees' Annuity and Benefit Fund Act.

Respectfully submitted,

GEORGE F. MULLIGAN,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Firemen's Assistance for Building Commissioner.

August 4, 1926.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

We have before us your letter of August 3, 1926, to which you attach a copy of a letter received by you from the Hon. Frank E. Doherty, Building Commissioner, in which he requests you to "detail sufficient number of firemen with sufficient apparatus to take down illegal shed front of lot at 2048 West Harrison street, size 8 x 8 feet, erected in violation of ordinance."

You wish to be advised as to whether or not you should immediately comply with the Building Commissioner's request, presumably the thought being in your mind as to whether or not the Building Commissioner has the authority to request you to proceed as he commands.

Section 405 of The Chicago Municipal Code of 1922 is in part as follows:

"405. *May direct fire department to remove.*) The Commissioner of Buildings shall have authority to direct the Fire Marshal to tear down any defective or dangerous wall or structure or any building or structure or part thereof *which may be constructed in violation of the terms of this chapter.*"

It is manifest from the above section that the Building Commissioner has ample authority to command you to proceed to tear down the shed which presumably has been erected in violation of the terms of the ordinances of the City.

Very truly yours,

BARNET HODES,

Approved:

Assistant Corporation Counsel.

FRANCIS X. BUSCH,

Corporation Counsel.

Ordinary Disability Rights of Employee Taken Sick Subsequent to Separation from Payroll.

August 4, 1926.

RETIREMENT BOARD, MUNICIPAL EMPLOYEES' ANNUITY & BENEFIT FUND.

Gentlemen:

Replying to your request for an opinion as to the ordinary disability rights of a municipal employee taken sick subsequent to separation from payroll, the following is submitted:

Your letter states that an employee, certified to his position on November 14, 1925, was laid off on December 31, 1925; that in January, 1926, he paid the required amount to the treasurer of the fund to protect his rights in the disability section of the fund; that he was taken sick on May 31, 1926; and that on June 22, 1926, he filed an application for ordinary disability benefits.

Your inquiry is as to whether or not the applicant is entitled to one-fourth of his salary from November 14 to December 31, 1925, or whether you are to allow the ninety day period the law allows for leave of absence to be counted as service; in other words, whether you are to pay him ordinary disability benefits for one-fourth of forty-eight days' actual service or for one-fourth of one hundred thirty-eight days' time.

Section 47 of the Municipal Employees' Annuity and Benefit Fund Act provides that ordinary disability benefit shall consist of an amount equal to 50 per cent of the salary of such disabled municipal employee as such salary shall be at the time such disability shall occur. If the employee in question was not on the payroll at the time his disability occurred, he was not in receipt of any salary and there is nothing upon which ordinary disability can be based.

It is very clear from the provisions of the act that ordinary disability benefit shall be paid only to municipal employees while they are actually in the service of the City. It is a form of health and accident insurance which the City provides from a fund to which the employees contribute and to which the City contributes, but it does not appear to be a health and accident insurance that runs or applies continuously to a municipal employee if he becomes separated from the payroll, no matter what may occasion the said separation. The payment required of municipal employees into the ordinary disability fund during a period of time when such municipal employee is not on the City payroll, is so required in order that the said employee may protect his membership in the said fund and upon again resuming employment with the City, become entitled to the benefits of the said fund without the necessity of a medical examination to prove that he is in good physical condition. That appears to be the only purpose of the continued contribution, and if a municipal employee, while off the payroll, does not see fit to continue his payments into the ordinary disability fund he simply places himself in a position where he can not again become a beneficiary of such fund until he has first established the fact that he is in good physical condition.

I am of the opinion that no municipal employee is entitled to ordinary disability benefits for any injury or illness with which he becomes afflicted during any period of time when he is not in the actual employment of the City, and upon a City payroll as such employee.

Respectfully submitted,

GEORGE F. MULLIGAN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Pension Rights of Widow Who Marries Pensioner After Retirement.

August 4, 1926.

RETIREMENT BOARD, POLICEMEN'S ANNUITY & BENEFIT FUND.

Gentlemen :

Replying to your request for an opinion as to the pension rights of Mrs. Elizabeth Gersch, the following is submitted :

Your letter states that an application for pension has been filed by Mrs. Elizabeth Gersch, widow of Charles H. Gersch ; that Gersch was discharged from the Police Department December 13, 1910, and his name was placed on the pension roll on January, 1911, his pension dating from December 13, 1910, at the rate of \$49.50 a month ; that, beginning in July, 1911, his name appeared on the pension roll at \$50 a month ; that on February 14, 1919, Gersch brought mandamus proceedings in the Superior Court against the City of Chicago to compel payment of his salary as sergeant in the active service from January 1, 1911, on the ground that he had been illegally removed from active service by the Civil Service Commission ; that the court found Gersch entitled to salary from and after November 12, 1914, in the amount of \$8,770, which amount was reduced by agreement to \$2,000 and judgment entered therefor ; that in July, 1923, Gersch brought proceedings in mandamus against your Honorable Body to be paid a pension of \$900 per year, instead of \$600 per year, from January 6, 1921 ; that judgment was entered against your Honorable Body for a total of \$870 which amount was paid ; and that Elizabeth Gersch was married to Charles H. Gersch on June 6, 1912.

Your question is as to whether or not there is anything in the history of this case, as outlined, that might constitute a bar to the award of a pension to Elizabeth Gersch. Charles H. Gersch having entered upon pension in January, 1911, his order to encourage and promote faithful, loyal and zealous

pension dating from December 13, 1910, the right of his widow to pension is controlled by the Police Pension Fund Act approved April 29, 1887, and in force July 1, 1887, as subsequently amended, and as such rights may have been affected by any subsequent legislation.

The original Police Pension Fund Act of 1887 granted age and service pension to policemen serving twenty years, but did not grant any pension to the widows of such retired policemen.

In 1899 Section 3 of the Act of 1887 was amended so as to provide for a pension to the widows and minor children under sixteen years of age of policemen retired upon age and service pensions.

In 1903 the Police Pension Fund Act of 1887 was amended to provide, among other things, in Section 6 of said amendment, as follows:

“Whenever any member of the police force of such city, village or town who has been retired after twenty years’ service, or physically disabled, shall then marry, said wife or child or children of such marriage, shall after his death receive no pension from such fund.”

In 1911 and again in 1913 the Police Pension Fund Act of 1887 was again amended, but no change was made in the provision of Section 6 hereinabove quoted.

In 1915 a new Police Pension Fund Act was enacted by the Legislature, and Section 3 of the Act of 1915 grants a pension to the widow of a policeman retiring after twenty years or more of service “in case the marriage of such policeman shall have taken place more than six months prior to the time the pension is granted him hereunder.”

In 1917 Section 3 of the Police Pension Fund Act of 1915 was amended, and granted a pension to the widow of a retired policeman “in case the marriage of such policeman shall have taken place more than one year prior to the time the pension is granted hereunder.”

In 1921 the present Policemen's Annuity and Benefit Fund Act was enacted, and Section 50 of this act provides, among other things, that widows of policemen who are pensioners under and by virtue of the Act of 1915, as subsequently amended, shall have the right to receive pension in accord with the provisions of the Act of 1915 as amended.

From the statement of facts given to me, it appears that Elizabeth Gersch was married to Charles H. Gersch subsequent to his having retired upon a pension, and on this state of facts and the provisions of the pension law, I am of the opinion that Elizabeth Gersch is not entitled to be paid a pension as the widow of Charles H. Gersch.

Very truly yours,

GEORGE F. MULLIGAN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Duty Disability Rights of Emergency Employee Working Under Temporary Appointment.

August 4, 1926.

THE RETIREMENT BOARD OF THE MUNICIPAL EMPLOYEES' ANNUITY AND BENEFIT FUND.

Gentlemen:

Replying to your request for an opinion as to the duty disability rights of municipal employees working under temporary appointment, the following is submitted:

Your letter states that in the Bureau of Engineering, Construction Division, there are calls for mechanics for emergency work when something happens to one of the bridges or at a pumping station; that the Bureau requests the names of

those who are in the eligible list for reinstatement, and, in order to get the number of men required, they send special delivery letters to them, and those who respond first are set to work at once; that the Civil Service Commission's records show in quite a few of these instances that the request is for temporary appointment, even though the names of the men working are on the civil service list; and that your Honorable Body has had a few claims for duty disability benefits from some of the employees who responded to the call, and were working and became injured while on the temporary appointment call.

Your inquiry is as to whether or not an employee working under these conditions is entitled to receive duty disability benefits if injured while working under the above named conditions.

There has heretofore been submitted to your Honorable Body Opinion No. 1595, in which virtually the same question was discussed, and to which reference is here made. In Opinion No. 1595, we held that the provision of Section 12 of the Municipal Employees' Annuity and Benefit Fund Act defining "municipal employee" and containing the provision that

"This definition shall not include and this act shall not apply to any person employed in the service of such city or the board of education of such city by virtue of temporary appointment as defined in Section 10 of said 'Act to regulate the civil service of cities,' "

does not apply to any person qualified as a "municipal employee" under the act, but was evidently intended to apply only to that class of temporary appointees who had never theretofore been in the service of the City as civil service employees and who were not certified from a civil service eligible list.

The evident purpose of the act, so far as concerns duty disability benefits, is to provide relief, compensation or benefits to municipal employees in the performance of City work, in order to encourage and promote faithful, loyal and zealous

service for the municipality on the part of those employed in City work. It was the evident intention of the Legislature to insure that any man in the classified civil service assigned to any class of work in the City service should have the benefit of the safeguard provided by the act against personal loss of time or wages resulting from any injury received by such employee while performing an act or acts of duty for the public in the City service.

I am of the opinion that any person in the classified civil service who has become a participant in the Municipal Employees' Annuity and Benefit Fund who shall thereafter be assigned to any employment in the City service by the Civil Service Commission (even though it be under or by virtue of temporary authority) who shall become disabled as the result of injury incurred in the performance of any act or acts of duty is entitled to receive duty disability benefit in accordance with the provisions of Section 46 of the Municipal Employees' Annuity and Benefit Fund Act.

Yours respectfully,

GEORGE F. MULLIGAN,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Rights of Policeman's Affianced.

August 4, 1926.

RETIREMENT BOARD, POLICEMEN'S ANNUITY & BENEFIT FUND.

Gentlemen:

Replying to your request for an opinion as to the right of a woman who claims a promise of marriage on the part of a policeman, the following is submitted:

Your letter states that there has been filed with your Honorable Body for consideration at its next meeting an application for annuity of a policeman, who, in his application,

states that he is a widower; that a certain woman claims that she and the said policeman have been living together as man and wife for about eight years; that no marriage ceremony has been performed but that he has promised on numerous occasions that he would marry her; that according to information she claims to have, and which seems to be borne out by the arrangement he has made with you for the handling of his annuity checks, he intends to desert her.

Your question is whether or not your Honorable Body may legally take any steps looking to the apportionment of his annuity between himself and this woman, assuming that she will be able to prove the statements she has made.

Section 58 of the Policemen's Annuity and Benefit Fund Act, as amended in 1925, gives to the Retirement Board the power to pay to the wife of any annuitant, pensioner or disability beneficiary such amount out of her husband's annuity, pension or disability benefit as any court of equity may order, or such an amount as the Retirement Board may consider necessary for the support of such wife or of the children of such annuitant or such disability beneficiary, in the event of his disappearance or unexplained absence or of his failure to support such wife and children. This is the only provision of the act which permits your Honorable Body to pay any portion of an annuity or other benefit to any person other than the beneficiary, and as the woman in the case referred to admits that she is not as yet the wife of the applicant there does not appear to be any occasion for your Honorable Body to take any action.

I am of the opinion that until the fiancee becomes the wife of a policeman she has no claim upon any portion of his annuity or pension under the provisions of the Policemen's Annuity and Benefit Fund Act.

Respectfully submitted,

GEORGE F. MULLIGAN,

Approved:

Assistant Corporation Counsel

FRANCIS X. BUSCH,

Corporation Counsel.

Building Classification for Trade School.

August 4, 1926.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.

Dear Sir:

This will acknowledge receipt of your communication of the 2d instant to which is attached copy of a letter received by you from H. C. Lewis, president of the Coyne Electrical School, regarding the classification of the building to be erected at 500-510 South Paulina street and to be used for instruction purposes by the school with which Mr. Lewis is associated.

It appears from Mr. Lewis' letter to you that the building to be erected is a five-story steel and concrete factory type building, open on all sides with no partitions in any of the floors, the entire floors with the exception of the first being one large open space to be filled with machinery. The first floor will be used occasionally for a lecture room, and you have refused a permit for the erection of this building because the plans and specifications submitted to your department do not call for a ventilating system throughout the entire building, the refusal being predicated upon the fact that you are classifying the building as a school in the ordinary sense and adaptation of the term.

The first floor of the building, which will be used as has been stated occasionally for a lecture room, will be equipped with a ventilating system approved by your department.

Mr. Lewis believes that it is improper to classify his institution as an ordinary school, although the school with which he is connected is known as a school and its function is to give instruction in electricity, they are in no sense in his belief the type of school governed by the provisions of the ordinance under consideration, and should not be required to have a ventilating system for the four upper stories.

Mr. Lewis, in speaking about the instruction given in the school, declares :

“Our instruction is purely shop type training and we haven’t a desk in the entire school nor do we have study rooms or periods.

The instruction given in our shop is all actual work on electrical machinery similar to that done in power plants, factories, etc. None of our students are children and the average age of our students is between 25 and 26 years of age.”

You wish us to advise you as to whether or not the Coyne Electrical School should be classified as a school within the definition of the term as used in the ordinances of the City in reference to ventilation and should be required to install a ventilating system throughout the entire building.

In an opinion previously requested from this office as to whether the Coyne Trade and Engineering Schools come within the definition of the word “school” as used in the definitions of Class IV-b or Class VIII of the Building Code of the City of Chicago, you were advised by this department as follows (July 17, 1922) :

“From an investigation we learn that the Coyne Trade & Engineering Schools is not a classical institution but is devoted entirely to instructing its students in manual training and working on machines and in the use of tools. The persons attending this school are more in the nature of apprentices than students, and in nearly every instance are pupils who have graduated from some classical institution of learning.

The word ‘school’ has been construed to mean a place of primary instruction; a common school or a grammar school. *Northrup v. City of Richmond*, 53 Southeastern.

In the case of *State v. Kallagher*, 145 Wis. 243, the word ‘school’ was construed to mean an institution of learning below a college or university, or a place of primary instruction, and the court in that case held that the word generally referred to a common or public school maintained at the expense of the public.

In the case of *Murphy v. Worcester Consolidated Street Railway Company*, 199 Mass., page 275, the Su-

preme Court of Mass. expressly held that the word schools would not be construed to include higher institutions of learning such as colleges, universities or institutions for the teaching of trades, professions or business.

It is therefore my opinion that the Coyne Trade & Engineering Schools is not a school within the meaning of either Class IVb or Class VIII of the Building Code of the City of Chicago, and in exercising your discretion as to the issuance of the permit in question you should not require it to comply with any of the provisions of either of said classes."

We do not believe that any facts have been presented to you to compel a deviation from the conclusions enunciated in the above quoted opinion.

It is therefore our opinion that the building to be erected at 500-510 South Paulina street to be used for instruction purposes by the Coyne Electrical School is not a school within the meaning of the provisions of the ordinances of the City requiring a ventilating system throughout the entire building.

Very truly yours,

BARNET HODES,

Approved:

Assistant Corporation Counsel.

FRANCIS X. BUSCH,

Corporation Counsel.

Necessity of Re-entering Service to Pass Physical Examination Preliminary to Ordinary Disability Benefits.

August 5, 1926.

THE RETIREMENT BOARD, MUNICIPAL EMPLOYEES' ANNUITY & BENEFIT FUND.

Gentlemen:

Replying to your request for an opinion as to the necessity of a municipal employee re-entering the City service to

pass physical examination preliminary to ordinary disability benefits, the following is submitted:

Your letter presents the following inquiry: "Suppose an employee resigned or was discharged and withdrew the amount he had to his credit in the fund and at some future time he took another examination for a classified or skilled laborer position and passed and was certified, would he have to pass a physical examination in order to be eligible for ordinary disability benefits under the new certification, he having been classed on the old job as a present employee when the Municipal Employees' Annuity and Benefit Fund Act became effective?"

Reference is herewith respectfully made to Opinions No. 1594 and No. 1613, heretofore rendered to your Honorable Body.

Section 34 of the Municipal Employees' Annuity and Benefit Fund Act provides that whenever any municipal employee, who shall resign or be discharged from the service after January 1, 1922, shall re-enter the service before he shall have attained an age of sixty-five years, deductions from the salary of any such municipal employee and contributions by the City for all purposes of the act shall be made, as thereinbefore provided, from the time of such re entrance into the service, and that new annuities shall be fixed for him. The deductions thereinbefore provided do not include deductions for ordinary disability benefits, since the latter deductions or contributions are provided for in Section 47 of the act and not in any section of the act preceding Section 34.

The provision of the Municipal Employees' Annuity and Benefit Fund Act relative to "ordinary disability benefits" constitutes a distinctive section of the fund, established for the purpose of securing health and accident insurance to municipal employees. The law governing that particular section of the fund is very explicit in providing that whenever a municipal employee lapses in his payments or is dropped from that section of the fund he can not again participate in the ordinary disability benefits until he shall have applied for re-

instatement, shall have submitted to a physical examination by a physician designated by your Honorable Body, and such physician shall have reported the said employee to be in good physical condition. There does not appear to be any exception made to this rule, and the act does not contain any provision as to the reinstatement of a municipal employee into the ordinary disability section of the act, once he has been dropped therefrom, other than as set out in Section 47 and as hereinabove referred to.

I am of the opinion that an employee who has resigned or who has been discharged and who has withdrawn the amount to his credit in the fund, and who later takes another examination for a classified or skilled laborer position and is certified thereto, can not participate in the ordinary disability benefits provided for in the act until he shall have first complied with the provisions of Section 47 relative to reinstatement in that section of the fund.

Respectfully submitted,

GEORGE F. MULLIGAN,

Assistant Corporation Counsel.

Approved :

FRANCIS X. BUSCH,

Corporation Counsel.

**Right of Employee Dropped from Ordinary Disability
Benefit Section to Again Participate, Upon
Taking New Civil Service Examination.**

August 5, 1926.

RETIREMENT BOARD, MUNICIPAL EMPLOYEES' ANNUITY & BENEFIT FUND.

Gentlemen :

Replying to your request for an opinion as to the right of an employee dropped from the ordinary disability benefit

section to again participate, upon taking new civil service examination, the following is submitted:

Your letter states that a municipal employee who had been on the eligible list for reinstatement on January 1, 1922, and who afterwards paid in the ordinary disability contributions for a short period, was dropped from the ordinary disability benefit section for failure to keep up payments of the same; that the said employee's name was later dropped from the civil service eligible list because of expiration of the waiver time; that he has since worked under temporary appointments in various capacities in the Bureau of Streets; that he took an original examination for a classified (or skilled labor division) position and passed; that on June 16, 1926, he was certified to the new position and the payroll clerks deducted the semi-annual deduction for ordinary disability benefit purposes from his pay on the July, 1926, payroll; and that the said employee wants to know if that automatically restores him to good standing in the ordinary disability benefit section of the law.

Section 47 of the Municipal Employees' Annuity and Benefit Fund Act provides that if the name of any municipal employee required to contribute for ordinary disability purposes shall fail to pay the amount stated into the Annuity and Benefit Fund, as stated, such municipal employee shall not have any right to ordinary disability benefit thereafter unless such municipal employee shall apply for reinstatement and shall submit to an examination by a physician and that such physician shall report said employee to be in good physical condition. There is no other method provided in the act for reinstatement into the ordinary disability benefit section.

I am of the opinion that when a municipal employee has once become a participant in or contributor to the ordinary disability benefit section of the fund and shall fail to pay the proper contributions into the fund, with the result that he is dropped therefrom, such municipal employee can never again become a participant in the fund until he shall have first applied for reinstatement and shall have submitted himself for

medical examination by a physician designated by the Board and shall be reported by such physician to be in good physical condition.

The semi-annual deduction reported by you to have been made from his pay on July, 1926, payroll for ordinary disability benefit purposes was a deduction made in error and should be returned to him.

Respectfully submitted,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved :

FRANCIS X. BUSCH,
Corporation Counsel.

**Right of Municipal Employee Whose Name Is
Dropped from the Civil Service List to Continue
Payments for Ordinary Disability Protection.**

August 5, 1926.

RETIREMENT BOARD, MUNICIPAL EMPLOYEES' ANNUITY & BENEFIT FUND.

Gentlemen :

Replying to your request for an opinion as to the right of a municipal employee whose name is dropped from the civil service list to continue payments for ordinary disability protection, the following is submitted :

There has heretofore been forwarded to you Opinion No. 1594, concerning the ordinary disability rights of an employee subsequent to his separation from the payroll, and reference is herewith made to that opinion.

There is nothing to prevent a municipal employee from continuing his payments in the ordinary disability benefit sec-

tion of the fund during any period of time that he is not on the City payroll, in order to enable him to participate in the benefits of that section without the necessity of applying for reinstatement and submitting to the physical examination, when he should again begin active work for the City and be upon a City payroll. There does not appear, however, to be any right on the part of a municipal employee to continue his contributions to that section of the fund if his name has been dropped from the civil service list, because he is then no longer a municipal employee and the Municipal Employees' Annuity and Benefit Fund Act applies only to persons who are municipal employees within the definition of that term in the act.

I am of the opinion that a municipal employee whose name was dropped from the civil service list in 1924 could not be permitted to continue payments into the ordinary disability benefit section of the Municipal Employees' Annuity and Benefit Fund.

Respectfully submitted,

GEORGE F. MULLIGAN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Status of Two-Story Building Connected with Taller Structure.

August 6, 1926.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

We have your letter of the 5th instant in reference to the approval of plans for a two-story building at 809-11 West Madison street.

You advise us that the said building is to be erected on the site where the Virginia Theater now stands and is to be connected on the first and second floors to the Mid-City Bank Building, 801-807 West Madison street, which is immediately adjacent to the proposed structure.

You further inform us that the Mid-City Bank Building is 87 feet in height including the pent house on the roof; that the bank building was built prior to 1910 and at the time this building was erected there was no provision in the ordinance requiring the installation of an outside stand pipe system in a building of this height.

You also state that under Section 1301 of The Chicago Municipal Code of 1922, Paragraph (b), all buildings hereafter constructed of a height greater than 80 feet shall have installed one or more inside stand pipes not less than four inches in diameter.

You inform us that you construe the provisions of Paragraph (b) of Section 1301 to mean that an inside stand pipe is required in the existing building of the Mid-City Bank which was erected prior to 1910, because of the fact that the proposed two-story building will be connected with the bank building and open on both floors and will, in a manner, in the future constitute one building.

It is our understanding from what you have placed before us that the building to be erected on the site where the Virginia Theater now stands, 809-11 West Madison street, is less than 80 feet in height, being only a two-story building. This being the fact, it does not come within the provisions of Paragraph (b) of Section 1301 which is in part as follows:

“(b) In all buildings hereafter constructed of a *greater height than 80 feet* there shall be installed one or more stand pipes not less than four inches in diameter * * *.”

It is therefore our opinion that since the two-story building to be erected at 809-11 West Madison street is not of a “greater height than 80 feet,” Paragraph (b) of Section 1301

of The Chicago Municipal Code does not provide for the installation of stand pipes. The fact that the two-story addition is to be connected with an existing building erected prior to 1910 does not change the status of the existing building and retroactively affect it in the sense of bringing it within the provisions of Paragraph (b) of Section 1301.

Very truly yours,

BARNET HODES,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Duty of Elevated Railroad to Protect Structure Against Building Operations.

August 7, 1926.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

Your letter of July 31st last with reference to the duty and liability of the Chicago Rapid Transit Company to protect and shore up its structure in the north and south alley abutting the City's property at Eleventh and State streets in the course of the foundation and caisson work for the new central police station to be there erected, is received. Your request to be advised whether in our judgment "the elevated railway company, which is operating under an ordinance in the public alley, is required, at its own expense, upon notice from the City or its contractor, to protect and shore up its columns and structure."

In reply, we beg to advise that in our opinion the Rapid Transit Company must, at its own expense, shore up and protect its columns and structures as indicated. It is the es-

tablished rule in this State, and throughout this country generally, that the real property right of lateral support does not extend to superincumbent buildings or structures on adjoining realty. It is now established as the weight of authority that the only damages recoverable for the denial of the right of lateral support are such damages as directly accrue by virtue of the actual subsidence of the land only, and the right of recovery is not extended to any damage resulting to improvements. This rule seems to have been predicated upon the theory that one property owner may not enlarge the liability of his neighbor by superimposing upon his property structures of unusual size, weight or type of construction, and the courts, apparently reluctant to be put in the position of having to determine what is reasonable construction, have denied the right of recovery altogether. The rule, as stated, itself suggests the almost certain impossibility of determining whether, but for the existence of the structure, there would have been any subsidence of adjoining land when lateral support is withdrawn for the purpose of ascertaining whether damages are recoverable, and may seem to seriously question the practical value of the property right of lateral support. However this may be, it is a purely academic question, and whatever the answer may be, it cannot affect the rule which is unqualifiedly as we have stated it.

The Rapid Transit Company is not the owner of the fee to the alley, and in this situation the only damage it could sustain would be to its columns and structure, and for the reasons indicated, no recovery could be had, there being no obligation on the abutter to furnish lateral support for the structure.

These conclusions are amply supported by the reasoning and deductions of Elmer M. Leesman, Esquire, of the Chicago Bar, in a carefully considered paper on the doctrine of lateral support published in 16 Illinois Law Review, 108, wherein the authorities are exhaustively analyzed and considered.

For the reasons indicated it is unnecessary to consider other elements that might be regarded as of interest in this

inquiry. It is understood, of course, that if the City or its contractor is guilty of any negligence in the foundation or other work that occasions damage to adjoining structures, a different rule will prevail.

It is conceivable that the Rapid Transit Company may differ with our conclusions and seek to enjoin the construction of the police station unless the City makes provision for the protection of the company's structure. Should this prove to be the case, doubtless an agreement without prejudice may be reached whereby the elevated structure may be protected at the immediate expense of either party, the ultimate liability for which to be expeditiously litigated, and thus avoid delay in construction.

As a precautionary measure, however, we believe the Rapid Transit Company should be notified before the City's contractor goes upon the ground with any materials or machinery, to protect its structure, and the company's reaction to such notification ascertained before any money is spent or liability incurred.

The suggested change in the building contract advocated by Mr. White, the architect, to cover the particular matter under inquiry is not inconsistent with the views herein expressed.

Yours very truly

JAMES J. COUGHLIN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Amount of Pension to Be Paid Minor Orphan Children.

August 9, 1926.

BOARD OF TRUSTEES, FIREMEN'S PENSION FUND.

Gentlemen :

Replying to your request for an opinion as to the amount to be paid as pension or annuity to minor orphan children, the following is submitted :

Your letter states that Benjamin E. Neff, after serving over twenty-three years in the Chicago Police Department, was awarded a pension of \$55 per month effective from September 1, 1913; that he died May 19, 1926, leaving two minor children, age 14 and 13 respectively; that his wife died some time ago; that the legal guardian of the children has filed application for pension on their behalf.

Section 50 of the Policemen's Annuity and Benefit Fund Act provides that children less than 18 years of age of police pensioners under the Act of 1915, shall, after the death of their father, have the right to receive pension in accord with the provisions of the Act of 1915, as subsequently amended.

The Police Pension Fund Act of 1915, as amended July 1, 1917, provides, in Section 3 of said amendment, as follows :

“Should any policeman pensioned hereunder leave no widow surviving him, or should his said widow die before his children arrive at the age of 18 years, each child shall receive while regularly attending school, the sum of \$15.00 per month. Pension paid to children shall cease as to any such child upon his or her arriving at the age of 18 years.”

The same section further provides as follows :

“Should any such child attending school cease attending school between the ages of 14 and 18 years, the aforesaid sum shall be reduced to \$5.00 per month.”

I am of the opinion that the minor orphan children in question are entitled to a monthly pension in the sum of \$15 each until each such child becomes 18 years of age, providing such child attends school during the school term.

Yours respectfully,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Payment of Consequential Damages out of Bond Fund.

August 16, 1926.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

In your letter of the 4th instant, relative to the judgment in favor of John V. Farwell Company, a corporation, in the sum of \$51,672.38, you ask whether the judgment should be charged to the bridge bond fund or to the general corporate fund. The question apparently arises from the fact that the judgment is for consequential damages incident to the building of the Monroe street bridge instead of for the construction work contracted for by the City.

Although the item of expense which this judgment represents may not have been contemplated at the time that the City entered into its contracts for the building of this bridge, it, nevertheless, may be regarded as a legitimate charge against the fund provided for the purpose of constructing the bridge. We know of no rule of law which limits the application of a fund raised by means of the sale of bonds to the direct obligation incurred by contract. As long as the

purpose for which the money is expended comes within the general purpose for which the bonds were issued, it makes no difference whether the obligation arises from express contract or as the result of damages of a consequential nature.

We are informed that there was at the time the bridge work was undertaken, and at the time suit was instituted in the year 1919, a fund derived from the sale of bonds that was available for bridge construction and the incidental expense relating thereto involved in the building of the Monroe street bridge. We are further informed that by the replenishment of this fund from time to time with proceeds of other general bridge construction bonds it has always been sufficient to meet this judgment. We therefore beg to advise you that it is proper for the City of Chicago to pay the said judgment out of the bond fund.

In your letter you say that it has come to your attention unofficially that the John V. Farwell Company has been taken over by Carson, Pirie, Scott and Company, and you ask to whom the money should be paid in view of that fact. In reply to that, we beg to advise you that no notice can be taken of the sale of the assets of the John V. Farwell Company so far as the payment of this judgment is concerned. You are bound to take notice only in case there is an assignment entered of record or notice of some kind is given to you directly that will require attention.

Yours truly,

LEON HORNSTEIN,

First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Payment from Bond Fund for Construction Work for Fire Department.

August 16, 1926.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

In your letter of recent date you state that the City Architect has requested you to draw a requisition against the bond issue recently authorized for the amount of the architectural services furnished or to be furnished by the Bureau of Architecture. You state among other things that the Acting City Architect says that there are not sufficient funds in this account to provide for architectural services for these properties, and you ask to be advised as to the manner of procedure.

As we understand the situation the work that you are having done is to be paid for out of the bond issue mentioned above, and that the only question that has arisen is whether such requisition should be made at this time or later. The reason that this question arises is because the capital account of the City Architect is low and the comptroller requires the requisition in order that he may feel authorized to let the City Architect draw on the capital account to the extent that he desires to do so.

Provision is made for a capital account for the Bureau of Architecture (see Appropriation Bill, Council Journal, January 16, 1926, page 2223). The regular order of procedure on this is for the City Architect to do his work, draw on this fund and then ask for reimbursement from regularly authorized appropriations with the addition of a small incidental or overhead charge. The writer has spoken to the City Architect and finds that it is his intention to proceed regularly in this matter, just as he does in all other cases. Hence,

the only thing necessary is a requisition from you against the bond fund calling for work to be done by the City Architect.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Payment of Refunds from Water Supply Pipe Installation.

August 16, 1926.

HON. JOHN J. SLOAN, President, Board of Local Improvements.

Dear Sir:

We are in receipt of a letter from you in which you state that sundry certificates have been presented to you dating back to 1899 calling for rebates on various installments of special assessments on warrants No. 22346 and 25657. You further state in your letter that you are advised that there is some rule whereby you must have a letter from the Corporation Counsel passing on the legality of paying the refund due on water supply pipes where they are over 20 years old, and you ask to be advised in regard to your authority to issue refund vouchers in these cases. After investigation by us it was ascertained that your inquiry did not relate particularly to the period of 20 years, and you withdrew that part of your request. You now want to know whether it will be proper for you to pay refunds on these warrants regardless of the fact that they are more than 20 years old.

From our investigation we find that these warrant numbers represent supplemental assessments levied in the years

1896 and 1897, appearing on pages 825 to 833 of the Collector's book under date of July 27, 1896. They are supplemental to an assessment levied in 1890 known as Washington Heights No. 31.

The only thing that is different about the record from that of other special assessments is that there is an old notation on the book which says "do not refund." This is in pencil and there is nothing to indicate whether it was merely a temporary note or some definite permanent order.

From the appearance of the receipts which are in the possession of Congressman Buckley, and were shown to the writer, there is nothing which distinguishes the receipts from any other case where a refund is permissible. The City ordinances at the time that the payments were made provided that when the water system paid a permanent revenue there should be a refund. This provision has been in force right along (see Revised Code of Chicago of 1897, Section 1672; Chicago Municipal Code of 1922, Sections 3331-2).

While we are disposed to give as much weight and consideration to the pencil note that we speak of as is possible, nevertheless, we feel that it is not enough to withhold payment unless it is explained. We have endeavored to secure an explanation of it, and for that purpose made inquiry in the Comptroller's Office, City Collector's Office and in the Board of Local Improvements. No explanation of the notation has been forthcoming.

Under these circumstances, we believe you will be justified in paying the refund on these warrants just as you are paying them in all other cases where proper showing is made, and the transaction comes within the provisions of the code above referred to.

Yours truly,

LEON HORNSTEIN,

Approved: *First Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Enforcement of Provisions of Zoning Ordinance.

August 17, 1926.

WILLIAM J. CONNORS, Esq., Superintendent, License Department.

Dear Sir:

You forwarded to this office a letter from Mr. Charles S. Duke who complains about the operation of a delicatessen store at 4944 Washington Park court in violation of the City Zoning Ordinance, and you ask to be advised concerning the duty of your department under the circumstances.

It appears that such business is contrary to the provisions of the Zoning Ordinance and for this reason you have refused to issue a license to the party operating the place. Notwithstanding the refusal of a license the place is being run, contrary to the ordinance. You state that you find it embarrassing to take a delinquent of this kind to court for failure to secure a license when the defendant expresses his willingness to secure one, and usually states that he is smoothing over the difficulties which he is having with the department that has jurisdiction as to the approval of the license application.

The enforcing officer in all matters relating to violations of the Zoning Law is the Commissioner of Buildings. Section 25 of the Zoning Ordinance gives him full power in this respect. If the matter is brought to his attention it will be his duty to proceed against anyone who is operating a place contrary to the Zoning Law. We assume that the difficulty in such cases is that there is no complaint made to the proper party.

We recommend that whenever the application for a license is refused on account of the place not conforming to the Zoning Law, if the party operates the business in spite of such a refusal, notice should be sent to the Commissioner of Buildings, who will then in all likelihood institute proceedings or make such agreement with the party as is permissible by the

terms of the ordinance. We suggest, however, that little credence need be given either in court or at other places to statements on the part of such persons as are arrested or prosecuted to the effect that they are attempting to iron out their difficulties with another department, unless they make some sort of showing or bring in some witness from such department as will corroborate their statement. In fact we apprehend that by far the greater number of these cases, where difficulty is encountered in prosecuting as indicated by you, are cases where the parties are deliberately playing for time by representing in each department that the other department will afford relief. Prosecutions for failure to take out licenses or for operating a business without a license do not necessarily abate when a party shows he is willing to take out a license which he is not entitled to. If such a situation arises as you speak of, and the court dismisses the charge, it will be proper to institute a new suit in your department, or the Building Commissioner may institute a suit for a violation of the Zoning Law.

Yours truly,

LEON HORNSTEIN,

First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Status of Vegetable Peddlers.

August 17, 1926.

WILLIAM J. CONNORS, Esq., Superintendent, License Department.

Dear Sir:

You state in your letter of recent date that your department is meeting objections on the part of some whose business

is that of buying vegetables and other products and selling them at wholesale to groceries and similar establishments from vehicles. One of the reasons why this difficulty is encountered is on account of a court decision by Judge McGoorty which restrained the City, in 1920, from enforcing a section of an ordinance regulating wholesale food establishments, providing that persons engaged in jobbing, vending or selling foods at wholesale from vehicles should be classed as wholesale itinerant food merchants and pay a license fee.

The ordinance which was construed by Judge McGoorty is no longer in effect, and in any event the class of persons that you are prosecuting do not come within the classification of wholesale food dealers. They are peddlers and should be required to pay a peddler's license.

It has been held that the term "peddler" as used in the City's charter includes persons engaged in selling to regular customers (*City of Chicago v. Bartee*, 100 Ill. 57); also, that persons who deliver from wagons to customers who have not previously ordered the goods are peddlers (*Davis v. City of Macon*, 64 Ga., 128; *City of Duluth v. Kropp*, 49 N. W. 235). The fact that the sales are made at wholesale does not change the aspect of the transaction nor convert a peddler into some other kind of tradesman.

We believe that you are justified in continuing to prosecute these parties under the peddler ordinance. If the judges of the Municipal Court which hear the cases brought by you hold otherwise, please advise this office, and we will attempt to have some one appear to argue the question, and, if necessary, prepare a record on which we can base an appeal.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Status of Itinerant Venders of Drugs.

August 17, 1926.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

This will acknowledge receipt of your letter of August 12th transmitting some "Indian Herb Medicine" taken from one Elahi Fazel.

Fazel was arrested by officers of your department charged with violation of Paragraph 51, Chapter 91, Cahill's Revised Statutes. Fazel has pack or basket peddler's license No. 87, and at the hearing of the case Judge Curran requested the officer to obtain the opinion of this department as to whether or not the medicine in question may be sold under the above mentioned license, and the case was continued to August 18th.

As the laboratory analysis of the Health Department will not be completed for some days, we have requested your department to obtain a continuance.

Paragraph 51, Chapter 91 of Cahill's Revised Statutes reads as follows:

"51. *None but registered pharmacists to conduct drug store, etc.—Penalty.*) § 1. That it shall be unlawful for any person not a registered pharmacist within the meaning of this Act to open or conduct any pharmacy, dispensary, drug store, apothecary shop or store, for the purpose of retailing, compounding or dispensing drugs, medicines or poisons, and any person violating the provisions of this section shall be liable to a penalty of not less than twenty or more than one hundred dollars for the first offense, and for each succeeding offense not less than fifty or more than two hundred dollars: *Provided, however,* that nothing in this Act will prevent any person or persons owning a drug store or pharmacy, who shall employ and place in active and personal charge of the same a registered pharmacist, and that nothing herein contained shall apply to or in any manner interfere with the practice of any physician or prevent him from supplying to his patients such articles as may seem to him proper, or with the exclusive wholesale business of any

wholesale druggist: *Provided, further*, that nothing contained in this Act shall apply to the sale of patent or proprietary preparations and remedies which do not contain opium or coca leaves, or any compound, manufacture, salt, derivative or preparations thereof when sold in original and unbroken packages only (Callaghan's 1916 Stat., Par. 7413).''

It is no violation of Paragraph 51, Chapter 91, to sell patent or proprietary preparations and remedies which do not contain opium or coca leaves, or any compound, manufacture, salt, derivative or preparations thereof when sold in original and unbroken packages, and we will advise you further upon this matter as soon as we receive the analysis of the medicine from the Department of Health.

We would, however, call your attention to Section 1123 of The Chicago Municipal Code of 1922, which reads as follows:

“1123. *Itinerant vendor of drugs.*) No itinerant or transient vendor of any drug, nostrum, ointment or appliance of any kind intended for the treatment of disease or injury, shall sell or give away, or offer to sell or give away, any such drug, nostrum, ointment or appliance, or shall, by writing or printing or any other method profess to cure or treat disease or deformity by any drug, nostrum, ointment or appliance, unless such vendor is licensed by the State Board of Health as an itinerant vendor of drugs. Any itinerant or transient vendor of any drug, nostrum, ointment or appliance of any kind intended for the treatment of disease or injury, who shall sell or give away, or offer to sell or give away, any such drug, nostrum, ointment or appliance, or shall, by writing or printing, or by any other method, profess to cure or treat disease or deformity by any drug; nostrum, ointment or application, without being then licensed by the State Board of Health as an itinerant vendor of drugs, shall be fined not less than twenty-five dollars nor more than two hundred dollars for each and every offense.

Very truly yours,

WILLIAM L. SULLIVAN,

Approved:

Assistant Corporation Counsel.

FRANCIS X. BUSCH,

Corporation Counsel.

Landing of Aeroplane in Loop.

August 24, 1926.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

Under date of August 24, 1926, you asked for an opinion as to whether or not it would be permissible under the City ordinance to permit one Mr. W. T. Ensign to start and end his aeroplane flight from the roof of the County Building. We beg to advise that under Section 172 of The Chicago Municipal Code of 1922, the City Council has prohibited in the following language such demonstrations:

172. *Prohibitions.*) No person shall guide any aircraft in a manner designed to give any demonstration of trick flying or stunt flying or aerial acrobatics, or give any manipulation of the controls which may tend to divert the aircraft from such a normal flight as is attended with every consideration for stability and safety. * * *."

We believe that the City Council considered a normal flight to be one that would start from the ground and would attain a height gradually. We must therefore hold that it is not permissible under the ordinance to allow Mr. Ensign to fly his aeroplane as requested in your letter.

Yours truly,

JAMES I. McCARTHY,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

**Powers of Board of Examiners of Plumbers With
Reference to Work of Sanitary District.**

August 31, 1926.

BOARD OF EXAMINERS OF PLUMBERS, CITY OF CHICAGO.

Dear Sirs:

Your recent communication addressed to the Corporation Counsel, requesting an opinion as to what steps should be taken to insure the installation, in accordance with the ordinances of the City of Chicago and the statute relating to plumbers, of certain work now being done within the corporate limits of the City for the Sanitary District of Chicago, has been referred to the undersigned for consideration and reply.

In and by an Act of the Legislature of the State of Illinois, relating to Plumbers (in force July 1, 1917, Chapter 109a, Callaghan's Illinois Statutes Annotated), it is provided in Section 1 thereof that,

“Any person now or hereafter engaging in or working at the business of plumbing in this State, either as a master plumber or employing plumber or as a journeyman plumber shall first receive a certificate thereof in accordance with the provisions of this Act.”

Section 2 of said act provides for examinations of persons desiring to engage in or work at the business of plumbing.

Section 3 creates a board of examiners of plumbers and provides for the appointment of the members thereof.

Section 4 defines the scope of examination of all applicants desiring to engage in or work at the business of plumbing, and fixes the fees for such examination and certificate to be issued to the successful applicant.

Section 5 provides that municipalities shall make rules governing plumbing work,

“and shall by ordinance or by-laws * * * and with the advice of the Department of Public Health, prescribe rules and regulations for the materials, construction, alteration and inspection of all plumbing and sewage placed in or in connection with any building in such city, * * *; and the board of health or proper authorities shall further provide that no plumbing work shall be done except in case of repairing leaks without a permit first being issued therefor * * *.”

Section 6 provides in part that,

“All persons who are required by this Act to take examinations and to procure a certificate as required by this Act, shall apply to the board of examiners of plumbers in the city, town or village where they reside
* * *.”

In and by Section 7 the duty of enforcing the provisions of said act is imposed on the Department of Registration and Education of the State of Illinois.

Section 8 provides a penalty for the violation of said act, and further provides for the revocation of certificates by said Department of Registration under certain conditions.

The enforcement of the provisions of said act is placed squarely upon the Department of Registration and Education, and any violation of said act should be referred to said Board for action.

The sanitary features of all installations of plumbing work are required to meet with the approval of the Department of Health, or chief health officer of the city, town or village. Any violation of the City ordinances in this respect should be reported to the Commissioner of Health, who is the enforcing officer in that regard.

The structural features of such installation, other than sanitary requirements, are subject to the approval of the Department of Public Works. There are conditions also under which the Commissioner of Buildings has authority—as when the violation is of the building code. Under such circumstances the Commissioner of Public Works or the Com-

missioner of Buildings, as the case may be, is the enforcing officer.

The powers of the Board of Examiners of Plumbers provided for by the foregoing statute, appear to be limited to the examination of applicants "desiring to engage in or work at the business of plumbing," and there does not seem to be anything in the ordinances of the City which extends or amplifies this power. We have been informed that in the past you employed inspectors and that when these discovered a violation, you would make complaint to the City Prosecutor. While any person may make complaint to the City Prosecutor, yet when your Board acts in its official capacity complaints should be made through the proper enforcing officer.

In this connection we beg to advise you that inquiry was made by a member of the law department of the Sanitary District of Chicago as to who was the proper officer to determine whether or not the ordinances of the City have been violated. In case of complaint, or on inspection, the duty is primarily on the enforcing officer to say whether or not there was a violation. If he cannot decide the question we will endeavor to assist him so far as the legal aspect of the situation is concerned, but he will have to look to experts on the class of work in dispute to say whether or not it is plumbing or something else. He may properly, under such conditions, seek advice from you as experienced plumbers, but such advice would not be in the nature of an official determination of the question but merely expert advice subject to rebuttal in case of dispute or litigation.

Respectfully submitted,

ROY S. GASKILL,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Right of City to Condemn Land Belonging to Cemetery Company.

September 2, 1926.

HON. E. I. FRANKHAUSER, Alderman, 49th Ward.

Dear Sir:

The request of Roger P. Minwegen, addressed to you and forwarded to the Corporation Counsel, requesting an opinion as to the right and power of the City of Chicago to condemn certain of the lands of the Rosehill Cemetery Co., for street and park purposes, has been referred to the undersigned for consideration and reply.

The right of eminent domain has been defined as "the right of the nation or the state or of those to whom the power has been lawfully delegated to condemn private property for public use, and to appropriate the ownership and possession of such property for such use upon paying the owner a due compensation to be ascertained according to law" (20 Corpus Juris 513 and cases therein cited).

With reference to cemeteries it has been held that the fact that lands have been previously devoted to cemetery purposes does not place them beyond the reach of the power of eminent domain (*Board of Water Commissioners v. Roselawn Cemetery*, 138 Minn. 458, 165 N. W. 279).

Accordingly, cemetery lands have been appropriated for highway purposes (*Trustees of Catholic Cathedral Church of Baltimore v. Manning*, 72 Md. 116, 19 Atl. 599; *Woodmere Cemetery v. Roulo*, 104 Mich. 595, 62 N. W. 1010) also for railroad purposes (*Concordia Cemetery Association v. Minnesota, etc., R. Co.*, 121 Ill. 199).

In some jurisdictions the statutes prohibit the opening and establishment of streets and highways, or the extension of railroads through cemeteries (*Hyde Park v. Oakwood Ceme-*

tery Association, 119 Ill. 141; *McCann v. Trustees of Mt. Gilead Cemetery*, 166 Ind. 573, 77 N. E. 1090).

Where the Legislature, by a special act, granted to a corporation perpetual immunity against the opening of streets through its cemetery without the consent of its directors, it was held that the word "through" was intended to mean the same as the word "over" and the right to open was denied (*Hyde Park v. Oakwood Cemetery Association*, 119 Ill. 141).

The Rosehill Cemetery Company was incorporated under an act of the Legislature entitled "An Act to incorporate Rosehill Cemetery Company," in force February 11, 1859 (Laws of 1859, page 29). The act provides, that the company shall have power to own property, not exceeding five hundred acres of land, for a cemetery, and to plat the same, suitable for the burial of the dead. The act also provides in part as follows:

"Section 9. No roads or streets or other thoroughfare shall be laid out through any property selected and held by said cemetery company for burial purposes, without consent of the managers of the company; nor shall any of the lands so selected and held be condemned for right-of-way by any other corporation for any purpose whatever; * * *."

In the case of *Hyde Park v. Oakwood Cemetery Association*, 119 Ill. 141, a similar statute was involved, and in construing same, the court, at page 147, said:

"It will be observed that the language of Section 6 is not of doubtful meaning, and it is plain that it was the intention of the Legislature, in adopting the section, to prevent the lands of the association from being appropriated to road purposes without the consent of the directors of the corporation."

It was further urged that the section above quoted was repealed by the Cities and Villages Act of 1872, and the court continuing at Page 147 said:

"If Section 6 was repealed by the General Act of 1872, the repeal was by implication, as the general act

does not, in any manner whatever, allude to the act incorporating the association. In the construction of statutes, it is a rule of law well settled, that a repeal by implication is not favored; and where two acts are seemingly repugnant, they should, if possible, be so construed that the latter may not operate as a repeal of the former by implication (*Town of Ottawa v. La Salle*, 12 Ill. 339). In the same case it was also held that a subsequent statute which was general, does not abrogate a former statute which is particular. The act conferring the powers on the association was special, and, under the rule announced, was not abrogated by the general law. * * * Under the general law, all roads and streets in the village are under its control, except the lands of the association, and as to those lands the association has exclusive control."

It was also urged that the acts of the Legislature creating the cemetery association, when accepted, and the purchase of lands under said acts, and the dedication of the same to public use, constituted a contract between the State and the corporators of the association, within the provisions of Section 10, Article I, of the Constitution of the United States, which prohibits legislation impairing the obligation of contracts, and the court, at page 148, said :

"The right of eminent domain is an element of sovereignty, and a contract in restraint of a free exercise of this right is not obligatory on the State, and does not fall within the inhibition of the Constitution of the United States * * *."

And continuing, at page 149, the court said :

"The state had no power to divest itself of the right of eminent domain, by any act it might pass which would prevent the exercise of that right in the future, when, in the opinion of the legislature, a case arose wherein the public interest demanded the exercise of the power * * * Now, the legislature has never determined, by any subsequent act, that the right of eminent domain shall be exercised as to this property, and until such time as the State shall otherwise determine, the association has the

clear right to hold the lands free from taxation, or the laying out of streets or highways through them."

By reason of the foregoing I am of the opinion that the lands of the Rosehill Cemetery Company, heretofore acquired for cemetery purposes, are under the exclusive control of the board of managers of said company, and will so remain until the legislative will shall be manifested by further legislation, and that under existing statutes no part of said lands is subject to condemnation or of being acquired for street or park purposes without the consent of said board of managers.

Respectfully submitted,

ROY S. GASKILL,

Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,

Acting Corporation Counsel.

Violations of Smoke Ordinance by Marine Craft.

September 10, 1926.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.

Dear Sir:

In your recent communication to the Corporation Counsel you state:

"A number of violations of the Smoke Ordinance have recently been reported against marine craft operating on construction work along the lake shore. Notices have been served with reference to the violations but no abatement of the nuisance has been had. Under these circumstances, can the city summarily abate the nuisance by drawing the fire, or by preventing further firing of the boilers?"

In and by Chapter 24, Article V, Sub-paragraph 75, Illinois Revised Statutes, the City Council is given express power, "To declare what shall be a nuisance, and to abate the same; and to impose fines upon parties who may create, continue or suffer nuisances to exist." (Validity upheld in *Roberts v. Ogle*, 30 Ill. 459.)

Pursuant to the foregoing power, the City Council passed certain ordinances, among which is Section 2129 of the Code of 1922, which provides in part as follows:

"The emission of dense smoke within the city from the smoke stack of any locomotive, steam boat, steam tug, * * * steam derrick, steam pile driver, * * * except for a period of six minutes in any one hour during which the fire box is being cleaned out or a new fire built therein, is hereby declared a nuisance and may be summarily abated by the commissioner of health or by any one whom he may duly authorize for such purpose. Such abatement may be in addition to the fine hereinafter provided."

The penalty for a violation of the foregoing ordinance is a fine of not less than ten nor more than one hundred dollars; "and each emission of dense smoke in violation of the provisions of this section shall constitute a separate offense for each and every day on which such violation shall continue."

The matter of abatement of the smoke nuisance has received the attention and consideration of the Corporation Counsel on numerous occasions covering a period of many years. In 1905 the Honorable Edgar B. Tolman, then Corporation Counsel, delivered an able opinion on the subject (Opinions of Corporation Counsel, 1897-1905, p. 1220), which is in part as follows:

"Aside from this new ordinance (referring to the then new smoke ordinance) the evil against which it is directed unquestionably constitutes a public nuisance at common law. (*Secord v. People*, 121 Ill. 623.)

Moreover, the action of the City Council in thus defining and declaring the nuisance is also unquestionably

supported by the authorities. (Am. & Eng. Ency. of Law, 2d Ed., Vol. 21, page 740 (citing cases).)

Since, therefore, the emission of dense smoke is a public nuisance both at common law and under this ordinance, it is in order next to consider what the power of the municipality is to abate a nuisance.

Mr. Justice Sheldon, in the case of *King v. Davenport*, 98 Ill. 305, has discussed the question with regard to the power of the municipality to enforce summary compliance with its ordinances prohibiting the erection of frame buildings within certain limits, by abatement, that is to say, by the tearing down of the building. I quote from his decision: 'As the summary abatement of nuisances is a remedy which has ever existed in the law, its exercise cannot be regarded as in conflict with constitutional provisions for the protection of the rights of private property. Blackstone, in his classification of remedies by the act of a party, says, "the fourth species of remedy by the mere act of the party injured, is the abatement or removal of nuisances," 3 Black. Com. 5,—and that "the reason why the law allows this private and summary method of doing one's self justice is because injuries of this kind, which obstruct or annoy such things as are of daily convenience for use, require an immediate remedy, and cannot wait the slow progress of the ordinary forms of justice." '

In support of the proposition that a municipality may use its police power in a summary way, without recourse to the courts, for the abatement of a nuisance, Mr. Justice Sheldon quotes numerous cases, those most appropriate to the question under discussion being as follows: *Hart v. Mayor, etc., of Albany*, 9 Wend. 571; *Baker v. Boston*, 12 Pick. 193; *Wadleigh v. Gilman*, 3 Fairfield, 403; *Blair v. Forehand*, 100 Mass. 136; *Morey v. Brown*, 42 N. H. 373.

In justifying the right of the municipality to use force for the abatement of the nuisance, and to act summarily, without resort to the protracted course of litigation, Justice Sheldon said:

'Every moment's delay in the removal of the nuisance is constant exposure to danger. Before any judicial inquiry could be had in the matter, the whole evil sought to be guarded against might be produced.' (Page 315.)

In answer to the argument of counsel, as appears from an examination of their briefs, that the fixing of a penalty to be imposed by prosecution and fine was an

indication of legislative intent that that alone should be the remedy used, Judge Sheldon said:

'The imposition of a penalty would but punish the offender, it would not remove the source of danger. This latter is the thing which the necessity of the case requires, and immediate abatement is the only competent remedy.'

* * * There can be no doubt of the power of the city since the passage of the revised code to take whatever steps may be necessary for the abatement of smoke nuisance. The remedy by prosecution and fine has accomplished much, but it has been found wanting in promptness and therefore in efficiency. Since the power of municipalities to abate nuisances has been sustained even to the extent of tearing down buildings and removing them from places where the building itself was a nuisance, I cannot doubt that the city in this instance has the right to do whatever may be necessary in order to prevent the emission of dense smoke, and if it can be prevented in no other efficient way, that the city authorities may draw the fires from under the boilers where dense smoke is being emitted and may prevent the operation of such boilers until they have been provided with efficient smoke preventing devices.

* * * * *

I would suggest that the remedy by abatement be employed by you in a manner harmonious with the provisions of the ordinance which governs the remedy by prosecution and fine; that is to say, before boilers are shut down or the fires drawn from under them, notice should be given to some responsible person in charge, and that this powerful and unusual remedy, while it should be employed with firmness, promptness and uniformity in all proper cases, is not an appropriate remedy in the case of the commission of a first offense."

I fully concur in the foregoing opinion.

Respectfully submitted,

ROY S. GASKILL,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Holding Minor's Benefit Fund Money in Trust.

September 13, 1926.

MUNICIPAL EMPLOYEES ANNUITY & BENEFIT FUND.

Gentlemen:

Replying to your request for an opinion as to the right of your Honorable Body to hold in trust certain moneys due to a minor until said minor comes of age, the following is submitted:

Your letter states that Mrs. Louise Kelly is the widow of Nathan Kelly, formerly a janitor employed in the City Hall and prior to his death a beneficiary of the M. E. A. & B. Fund under the ordinary disability section; that Mr. Kelly died on or about July 17, 1926, leaving a widow and two daughters by a former marriage under the age of 18 years, and therefore eligible to children's annuity until their eighteenth birthday; that Harriet Kelly, one of the minor daughters, will be of age June 17, 1927, and that the stepmother desires to know as to whether or not your Honorable Body could not hold the moneys of the minor until she comes of age instead of requiring a guardian to be appointed with the expense incident thereto.

There is nothing in the law requiring a minor child to apply for benefit at any particular time, and in view of the fact that the minor child in question will be of full age on June 17, 1927, I would recommend that the payments be deferred until the child applies for the same after attaining her majority.

I am of the opinion that when a minor child has no guardian prior to attaining his or her majority, any moneys properly payable to such minor child during minority of such

child shall be paid to such child personally after such child has attained his or her legal majority.

Respectfully submitted,

GEORGE F. MULLIGAN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Status of Suspended Fireman.

September 16, 1926.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

Referring to your official inquiry of April 27, 1926, concerning the complaint of Fireman Gerald F. Griffin, and submitting therewith three general questions, an opinion was duly prepared covering the whole of your inquiry.

But the case of Fireman Griffin was considered to be so involved in the answers to the general questions that a new opinion was deemed advisable which should be limited to this fireman's case. Absences on vacation have caused the delay in the submission of the new opinion.

It is the opinion of the Corporation Counsel's office that this case is governed by Section 12 of the Civil Service Act, which reads as follows:

"Sec. 12. Removals. No officer or employe in the classified civil service of any city who shall have been appointed under said rules and after said examination, shall be removed or discharged except for cause, upon written charges and after an opportunity to be heard in his own defense. Such charges shall be investigated by or before said civil service commission, or by or before

some officer or board appointed by said commission to conduct such investigation. The finding and decision of such commission or investigating officer or board, when approved by said commission, shall be certified to the appointing officer, and shall be forthwith enforced by such officer. *Nothing in this act shall limit the power of any officer to suspend a subordinate for a reasonable period, not exceeding thirty days.* In the course of an investigation of charges each member of the commission, and of any board so appointed by it, and any officer so appointed, shall have the power to administer oaths and shall have power to secure by its subpoena both the attendance and testimony of witnesses, and the production of books and papers relevant to such investigation. Nothing in this section shall be construed to require such charges or investigation in cases of laborers or persons having the custody of public money, for the safe keeping of which another person has given bonds."

This section includes two distinct subject-matters, namely: the removal or discharge of a civil service employee, which is placed within the exclusive power of the Civil Service Commission; the suspension of a civil service employee, which is placed within the exclusive jurisdiction of the head of a department. The Supreme Court in the case of *Thomas v. The City of Chicago*, 273 Ill., at page 483, says:

"The language of section 12 is explicit and unambiguous. It provides squarely that 'nothing in this act shall limit the power of any officer to suspend a subordinate for a reasonable period, not exceeding thirty days.' It is contended by counsel for the appellant that this provision only refers to suspensions for cause, as enumerated in that section, and was clearly inserted for the purpose of enabling the head of a department to maintain necessary discipline and efficient service by temporarily suspending an employee pending an investigation of charges preferred against him or while his case was being considered. While, undoubtedly, the head of the department would necessarily have the power to suspend a subordinate for these causes if the head of a department were to have any control over such subordinate or anything to say about the management of his department, there are a great many causes, other than

those given by counsel for appellant which might make a suspension or lay-off of the employees of a department necessary. Can it reasonably be said under the clear and explicit language of the statute, that the head of the department has not the power to lay off employees under him for periods of less than thirty days for lack of work, lack of funds or other good cause? The Appellate Court has made a finding of fact that the action of the head of the department was taken in good faith and in the interest of economy and necessary retrenchment and with no intent to circumvent or evade any provision of the Civil Service law, and this finding of fact is conclusive on this court."

That the power to suspend for a period not exceeding thirty days in disciplinary matters and for other causes is lodged in the heads of departments is too obvious to admit of discussion.

In any case of such suspension, where the department head acts in good faith upon a proper cause actually established by the facts, and a statement of the cause of such suspension is given to the subordinate in a letter or notice thereof, and the head of the department reports such suspension to the Civil Service Commission for the purpose of deducting from the payroll the salary of such subordinate for the period of suspension, it is our opinion that such state of facts establishes a complete defense to any action that might be brought in behalf of such subordinate civil service employee.

It is generally held in other jurisdictions that this power of suspension necessarily exists in heads of departments, indeed, it is essential to a successful and proper administration of the public service. We need not cite the cases to support this general rule of law. It must be said, however, that deduction from the salary of the civil service employee cannot be made by way of fine or a penalty. And, if the fireman in this case was not actually suspended from the work for any period but rendered his services, then he would be entitled to recover his pay for such period. And, we would further state that, if the cause of suspension is the violation of a

rule or regulation of the department such rule or regulation should be referred to and stated in the letter of notice to the subordinate who is to be suspended.

Respectfully yours,

FRANCIS J. VURPILLAT,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Annuity and Service Rights of Public Library Employees Becoming Participants in Municipal Employees' Annuity and Benefit Fund.

September 17, 1926.

RETIREMENT BOARD, MUNICIPAL EMPLOYEES' ANNUITY & BENEFIT FUND.

Gentlemen:

Complying with your request for a further opinion as to the rights of employees of the Chicago Public Library who become participants in the Municipal Employees' Annuity and Benefit Fund of Chicago, the following is submitted:

Your letter inquires as to what credit shall be given for prior services to, and as to when the annuity fund shall start to accumulate for, employees of the Chicago Public Library who withdraw from participation in the Public Library Pension Fund and become participants in the Municipal Employees' Annuity and Benefit Fund.

In Opinion No. 1592, heretofore rendered to your Honorable Body on August 4, 1926, I referred to the fact that Section 12 of the Municipal Employees' Annuity and Benefit Fund Act specifically excludes from classification as a

“municipal employee” any employee of the City of Chicago or Board of Education who shall be a participant in any annuity and benefit fund, annuity and retirement fund or any pension fund in operation in the City of Chicago at the time the Municipal Employees’ Annuity and Benefit Fund came into force and effect, excepting a City employee who was a participant in the annuity and benefit fund provided by the act, or in a municipal pension fund defined in said Section 12.

There does not appear to be any provision in the Municipal Employees Annuity and Benefit Fund Act which applies to a public library employee who resigns from participation in the Public Library Pension Fund other than the provision in Section 12 hereinbefore referred to, which provision excludes such employee from classification as a “municipal employee” during his or her participation in such Public Library Pension Fund.

The employee so entering must be classed as a “future entrant,” which is defined by the act as “any municipal employee who shall be employed as a municipal employee of such city * * * for the first time” on and after January 1, 1922. While such public library employee has been a “city employee” he has not been a “municipal employee” within the definition of the Municipal Employees’ Annuity and Benefit Fund Act, and is, therefore, not eligible to be credited with the period of service rendered by such employee prior to becoming a participant in the Municipal Employees’ Annuity and Benefit Fund for the reason that such credits are given to only those who have been “municipal employees.”

Section 42 of the Municipal Employees Annuity and Benefit Fund Act provides for credit, for annuity and benefit purposes under the provisions of the act, for any service rendered by any policeman, fireman or teacher in the public school, but no such provision is made for employees of the Chicago Public Library.

I am of the opinion that an employee of the Chicago Public Library who has been a participant in the Public Li-

brary Pension Fund and who has resigned from participation in such fund subsequent to January 1, 1922, becomes a participant in the Municipal Employees' Annuity and Benefit Fund as a "future entrant," and that such employee becomes entitled to credit for services and to annuity fund accumulation only from the date such public library employee ceases to be a participant in the Public Library Pension Fund.

Respectfully submitted,

GEORGE F. MULLIGAN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Annuity of Child Living with Stepmother and Whose Own Mother Is Living.

September 17, 1926.

RETIREMENT BOARD, POLICEMEN'S ANNUITY & BENEFIT FUND.

Gentlemen:

Replying to your request for an opinion as to the annuity rights of a minor who is living with her stepmother and whose own mother is still living, the following is submitted:

Your letter states that Russell B. Abbott died June 2, 1925, leaving him surviving a widow and two children; that one child was born of his marriage with Martha Abbott, from whom he was divorced in 1919 or thereabouts, the divorce decree having awarded him custody of the child; that since his death his second wife has been caring for this child and for her own child by Mr. Abbott, and has been receiving children's annuities of \$10 each; that the second Mrs. Abbott has informed you that legal steps are about to be taken

by the mother of the first child to regain its custody, and that no legal action was ever instituted looking to the legal adoption by herself of the first child.

You inquire as to whether the legal custody of the child would automatically pass to the second Mrs. Abbott upon the death of her husband and whether your Honorable Body is acting within the scope of the law in paying the child's annuity to the second Mrs. Abbott.

Replying to your first question, the answer is no. While the second Mrs. Abbott has the actual custody of the child, the legal custody could have been conferred upon her only by legal adoption of the said child, or by a decree of court giving her such legal custody, either by the Probate Court in a guardianship proceeding, or in a court of record in a contest over such custody.

As to your second question, Section 44 of the Policemen's Annuity and Benefit Fund Act contains the following provision:

"Any annuity which shall be granted for the benefit of any child shall be paid to the parent of such child who shall be providing for such child, unless another person shall have been or shall be appointed by a court of law as the guardian of such child."

The second Mrs. Abbott is not the "parent" of the child in question, and while she may be providing for the child, the law makes no provision for the payment of the annuity to her, unless she has herself appointed guardian by a court of law, as required by the act.

I am of the opinion that the annuity payable for the benefit of a minor child who is living with its stepmother, cannot be paid to such stepmother until letters of guardianship have first issued to her.

Respectfully submitted,

GEORGE F. MULLIGAN,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Electric Light Poles and Wires in Loop District.

September 17, 1926.

HON. LEO J. WINIECKI, Commissioner of Public Service.

Dear Sir:

Your letter of the 3d inst. in reference to electric light poles and wires in the alley east of Franklin street in the rear of the premises of the American Linen Supply Company at 829 North Franklin street is received.

From your letter we note that poles of the Edison Company in the alley mentioned seem to interfere with the accessibility of the company's building and that you are interested to learn whether or not the company can be required to relocate the poles. Any unreasonable interference with the ingress and egress to property is necessarily a transgression of the rights of the property owner. This rule, however, is not to be construed too broadly. The poles and wires of the Edison Company may be an obstruction only because of the particular use made of the property by the owner. If, after the laundry company's building was erected, the poles of the Edison Company were so placed as to constitute an interference with the ingress and egress to the building, it is clear that the company could be required to relocate the poles so as not to constitute such an interference. If, however, the property was improved after the erection of the poles and with knowledge on the part of the property owner of the existence of the poles, we think it is doubtful if the owner can compel the removal or relocation of such poles, unless it can be shown that no matter what use was made of the property, or no matter what the type of construction or location of entrances, such poles would still constitute an obstruction and interference in the proper use and enjoyment of the property. If it would have been impossible or impracticable for the laundry company to construct its building in any other manner than that employed, we believe that the liability for the cost of relocating the poles should be assumed by the Edi-

son Company. If, however, the laundry company might have constructed its building in such a way as to obviate the necessity for relocation of the poles without adding unreasonably to the expense of said construction and without diminishing in any way the usefulness and suitability of the building for the purposes of the owner, we do not believe the Edison Company can be required to bear the expense of relocating the poles. We do not know of any case where this precise situation has been adjudicated, but we believe that what we have indicated is the rule that ought to be followed, depending, of course, on the facts of each particular case.

The Edison Company takes its rights in the alley under the City and can acquire no greater right than the City itself can exercise. The right of ingress and egress is a property right legally described as an easement appurtenant to the land, and may not be interfered with by any improper use of any servient estate. The City could not destroy an abutter's right of ingress and egress and consequently the Edison Company can take no greater right than the City itself and likewise cannot interfere with such right. The abutter, however, cannot add to or enlarge either the City's or the Edison Company's liability by arbitrarily improving his own property in such a way as to render public utility property in the street or alley a nuisance and an obstruction. It is impossible for us to say, therefore, on the facts as indicated by your letter, whether the Edison Company or the laundry company should bear the expense of relocating the poles in question. The real issue involved is a question of fact, and what a court or jury might determine to be the fact is too uncertain and dependent upon too many considerations to warrant us in saying definitely that either company is liable for the cost.

Yours truly,

JAMES J. COUGHLIN,

Approved:

Assistant Corporation Counsel

FRANCIS X. BUSCH,
Corporation Counsel.

Power of Zoning Board of Appeals Over Factory Building.

September 18, 1926.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

This will acknowledge the receipt of your letter of September 11th transmitting a written application for permit for factory building at 5401 South Western boulevard.

According to your letter this is the second application that you have received for the erection of a factory building at this location. You refused the first on the ground that it was contrary to the provisions of the Zoning Ordinance, and your decision was duly affirmed by the Board of Appeals.

"The applicant, however, has revised his application," you state, "and contends that it (the new structure) is the extension of a conforming use, as these premises both in the buildings and in the open have been used for manufacturing purposes for a number of years previous to the enactment of the Zoning Law."

The new application further sets forth:

"While metal fabricating will be done, the amount of pneumatic riveting will not exceed 5% of all the riveting done. Furthermore, all of this riveting will be done within an enclosed structure, of which the South wall will be of solid brick construction, without any openings of any character whatever, and will reduce to a minimum the creation or emission of noises. Every precaution to that end has been and will be taken. There will be no noises emitted prejudicial in any way to the health or comfort of the people residing in that vicinity."

You desire our advice as to whether as a matter of law the applicant is entitled under the terms of the Zoning Ordinance to a permit from your department.

While the premises on which it is desired to erect the new factory building are by the terms of the Zoning Ordinance in a manufacturing district, yet we understand they are nearer to an apartment district than 400 feet. Certain factory uses, known as M1 uses, are permitted in a manufacturing district regardless of their distance from an apartment district, but metal fabricating processes, where snap riveting is done, are expressly classified as M2 uses and M2 uses may not be nearer than 400 feet to an apartment district.

True, the applicant for the permit states that "the amount of automatic riveting will not exceed five per cent of all the riveting done," but the Zoning Ordinance classifies "Metal fabricating processes or the assembling of materials where snap riveting is done," as an M2 use without regard to the percentage of such automatic riveting that may be accomplished.

In case the proposed building were to be merely the extension of a conforming use, as intimated, there could of course be no legal objection to it. If snap riveting was being done on these premises, however, within 400 feet of an apartment district, at the time the Zoning Ordinance took effect, the use would be a non-conforming one and a non-conforming use may not be extended. (Section 14, Paragraphs B and K of Zoning Ordinance.)

We do not believe that the issuance of a permit by your department for this use within 400 feet of an apartment district would be in conformity with the provisions of the Zoning Ordinance. You are vested with no discretion by the Zoning Ordinance, but if the applicant for the permit feels that he has been aggrieved, his recourse is to the Board of Appeals. (319 Ill. 231.) In case of discrimination it can be removed by the administrative action of that body for which provision is made both by the enabling act and the ordinance. (319 Ill. 98.)

In the case of *Cann v. City* (241 Ill. App. 21), the court said:

"It would seem, therefore, that there is thus afforded a complete and distinct remedy at law for any grievance

arising under the administration of a zoning ordinance. It is manifest that the statute recognizes that from the very subject of the enabling act and any ordinance that may be passed under it, 'practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the ordinance' will naturally be encountered and require such latitude of decision as will be in harmony with the 'spirit of the ordinance' and at the same time promote 'substantial justice.' "

Should the applicant take an appeal to the Board of Appeals, under the new state of facts presented, that body, we have no doubt, would give careful consideration to the hardship claimed by him as well as to the other matters set forth in his application as to the character of the use proposed and his endeavors to make it as unobjectionable as possible.

The Board of Appeals, if it saw fit, could impose requirements as a condition in permitting the use that would safeguard surrounding property, observe the spirit of the ordinance and comport with public safety and welfare. (234 N. Y. 484.)

Very truly yours,

WILLIAM L. SULLIVAN,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,

Corporation Counsel.

Enforcement of Ordinance Concerning Draining Water from Roofs.

September 18, 1926.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.

Dear Sir:

This will acknowledge the receipt of your letter of September 15th relative to our opinion of March 12, 1926, advis-

ing you that the Department of Buildings should enforce Paragraph C of Section 805 of The Chicago Municipal Code of 1922, which Paragraph C reads as follows:

“(c) The water from all roofs shall be carried to the sewer in metal conductor pipes. Every such conductor shall be continually maintained in good condition.
* * *”

It now develops that the City Council thereafter and on July 22, 1926, repealed said Paragraph C. In place of it the City Council at the same time enacted a very similar provision which it made a part of Section 3014 of the code.

The Commissioner of Buildings, you state, has referred to your department, since the passage of the latter ordinance, a number of complaints claiming that he had no further jurisdiction over the installation and maintenance of such metal conductor pipes.

You wish to be advised whether it is the duty of the Department of Health to enforce this new provision of Section 3014.

In our opinion of March 12, 1926, holding that it was the duty of the Department of Buildings to enforce what was formerly Paragraph C of Section 805, we said in part:

“Section 805 is a part of Chapter XVII of the Revised Municipal Code. This chapter is entitled ‘Buildings,’ and contains the so-called building code of the City of Chicago. Also the said Chapter XVII establishes the department of buildings * * *”

Since the writing of that opinion, and it may be as a result thereof, the City Council has seen fit to take the provision concerning the carrying of water from roofs out of Chapter XVII which contains the so-called building code. At the same time the City Council placed this requirement in Article LX which is entitled “Plumbers and Plumbing” and which contains regulations relating more or less to the public health.

We do not wish to be understood as suggesting that the particular chapter of the code in which an ordinance may be found necessarily and without exception determines the department of the City government charged by the City Council with its enforcement. However, the recent legislative proceedings surrounding the provision in question does in this case, we think, afford considerable light on the question.

The City Council expressly repealed Paragraph C of Section 805 and simultaneously added to Section 3014 what was substantially old Paragraph C, making said Section 3014 read now as follows:

“3014. Rain Water Leaders—Prohibited Uses—When to be Trapped—Construction and requirements.) The water from all roofs shall be carried to the sewer by means of metal gutters and metal conductors pipes. Every such gutter and such conductor shall be continually maintained in good condition. Rain water pipes or leaders shall not be used as soil, waste or vent pipes; nor shall any soil, waste or vent pipe be used for a rain water pipe or leader. Where a rain water leader opens near any window, door or vent shaft, or is so located as to render it likely to become a nuisance, if not trapped, it shall be properly trapped far enough below the surface to prevent its becoming a nuisance or freezing.”

“Inside rain water leaders shall be made of extra heavy cast iron or tar or asphaltum coated wrought iron pipe or galvanized wrought iron pipe, with roof connections, made gas and water tight by means of heavy lead or copper drawn tubing, wiped or soldered to a brass ferrule, calked or screwed into the pipe. Outside rain water leaders may be of sheet metal, but they shall connect with the house drain by means of a five-foot length of cast iron pipe extending vertically at least four feet above the grade level.”

We have heretofore held that the regulations contained in Section 3014, before its amendment as above indicated, related to the public health and should be enforced by your department.

It is difficult to perceive of any logical reason for the action of the City Council in expressly repealing Paragraph C and then simultaneously adding the substance thereof to Section 3014 except to make plain its intention that the regulation should thereafter be enforced by your department along with the remainder of Section 3014 which has clearly to do with the public health and which we had already advised should be enforced by your department.

The intent of the lawmaking body is the law, and in view of the ordinances of the City Council of July 22d last, we can only advise you that in our opinion Section 3014 as amended on that date should be enforced by your department. This includes the provision under discussion which reads: "The water from all roofs shall be carried to the sewer by means of metal gutters and metal conductor pipes. Every such gutter and such conductor shall be continually maintained in good condition."

Very truly yours,

WILLIAM L. SULLIVAN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Use of Money from Bond Fund Issue for Benefit of Fire Department Improvements.

September 20, 1926.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

We are in receipt of your letter of recent date in which you call our attention to the fact that you have issued a voucher for the reimbursement of the real estate capital ac-

count for the purchase of the site on California avenue near Rosemont avenue, and that the Fire Commissioner is in doubt whether this is the proper method to pursue in making this adjustment. You state in your letter that the Fire Commissioner declines to approve the voucher on the theory that it will be necessary for the City Council to make a transfer of funds.

The purchase of the property in question was authorized by the City Council on April 21, 1926 (Council Journal, p. 3268) and the Comptroller was authorized to charge the purchase against the real estate capital account. The ordinance, however, expressly stated that the sum of \$3,500 thus authorized to be paid was to be expended as a site for a fire station. It appears further that the purchase was temporarily charged against the real estate capital account in accordance with the request of the Fire Commissioner under date of April 5, 1926, with the understanding that the capital account should be reimbursed as soon as the money was appropriated. Such appropriation was to be made from the proceeds of bonds that had previously been authorized and approved by the people.

On June 30, 1926 (Council Journal, p. 3956) \$100,000 was appropriated for the purchase of sites and construction of new buildings specifically named, among them being a site in the vicinity of Western and Devon avenues. The site selected by the ordinance of April 21, 1926, was in the vicinity of these streets, and undoubtedly was the site for which this appropriation was made.

Such being the case, the City Council has made a proper appropriation from the bond fund for the purchase of this site, and it is not only unnecessary to make a transfer in order to use such money, but it would be impossible to do it under the construction that we give to the statute, because the real estate capital account is an appropriation made to another department of the City government.

The proposed method of reimbursing the capital account is in accordance with the usual practice in cases of this kind. The capital account is used for the purpose of doing work,

or making purchases, as the case may be, and the appropriation for the specific thing is later drawn on by voucher in order to make good what was expended from the capital account. No transfer is required at any time, and it will readily be seen that if such transfer were made it would result in swelling the money in the capital account beyond what it was originally intended to be.

We are, therefore, of the opinion that the procedure that you have followed was correct, and that the sum of \$3,500 should be drawn from the appropriation made for this site and placed in the real estate capital account.

We return herewith vouchers that you submitted, together with two letters from the Fire Commissioner.

Very truly yours,

LEON HORNSTEIN,

First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Sinking Fund as an Offset to Bonded Indebtedness.

September 21, 1926.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

The Law Department rendered you an opinion under date of June 12, 1926, in which we undertook to interpret, and to apply to the conditions existing in the City's fiscal affairs, the recent decision of the Supreme Court in the case of *Wade v. East Side Levee District*, 320 Ill. 396.

This opinion took the form of a series of answers to seven direct questions which you propounded. These questions had to do with the following subjects:

1. Accrued interest on bonds,
2. Accrued interest on tax warrants,
3. Accrued interest on outstanding judgments,
4. Taxes in course of collection,
5. Liability on leases,
6. Liability on contracts,
7. Outstanding warrants.

You did not specifically ask about the status of sinking funds accumulated for the purpose of paying bonded indebtedness, nor whether such funds could be set off against the bonded indebtedness in computing the City's debt. Since there was no question asked on this point we did not essay to give you any advice relative thereto in our written opinion. There was, however, some language used in the Wade decision which disturbed us greatly and which seemed to cast a doubt on the propriety of deducting the sinking funds from the outstanding indebtedness.

The court, at page 414, said:

"The stipulation filed herein shows cash in the treasury in the amount of \$185,943.68, and taxes were received from August 7, 1920, to December 31, 1920, in the sum of \$155,044.92. The sum of \$300,000 of the outstanding bond issue shown under item I was due on September 1, 1920, and was paid on that date, the money used therefor, so appellant states, having been specifically levied and appropriated for that particular purpose by the district tax levy ordinance of 1919. It is contended by appellant that the district should receive credit for the \$300,000 collected and applied to the specific purpose mentioned."

These words seemed to indicate that out of the total of \$340,998.60, made up of \$185,943.68 actually in the treasury on August 7, 1920, and the sum of \$155,044.92 thereafter collected at least \$300,000 had been collected for the purpose of retiring the bonds, and that therefore whatever money was on hand was in a sinking fund which was to be "applied to the specific purpose mentioned." Concerning this the court said, at page 415:

“In the case of *City of Chicago v. McDonald, supra*, this court, in considering the question of applying cash in the treasury of a municipality and taxes levied as a credit or deduction against municipal indebtedness, adopted the following language, which we think applicable in this case: ‘Upon what principle it is contended that an outstanding debt is not a debt by reason of some cash in the public treasury it is difficult to perceive. As long as the cash is not applied to the payment of the debt the debt must remain. Nor can it be perceived upon what principle uncollected taxes in course of collection can be held to reduce the floating debt until they are actually collected and applied to its reduction. * * * The question is not one of insolvency but solely one of indebtedness.’ ”

If the language above set forth is to be understood as meaning that money in sinking funds expressly collected and preserved for the purpose of retiring bonds (which under the law must not be used for any other purpose) cannot be set off against the indebtedness created by the bonds which it is to retire, it would be directly in conflict with a former decision of this court which held as follows:

“Item VI—The evidence shows that \$1,049,606.22 is the total amount in the city treasurer’s hands which can be properly applied for sinking fund purposes. The item, ‘Due sinking funds, \$2,433,656.09’ is not a debt of the city, but the amount in the hands of the city treasurer belonging to the sinking fund should be deducted from the amount of the city’s bonded indebtedness other than world’s fair bonds.”

Stone v. City of Chicago, 207 Ill. 492, 510.

The “Item VI” appearing in the above excerpt appears on page 498 of the *Stone* decision and read as follows:

“VI. Due sinking funds\$2,433,656.09
 Portion included in this amount due sinking
 funds for which there is no provision by
 the city\$1,384,049.87”

Such a direct reversal as seemed to be implied in the words of the Supreme Court in the *Wade* case, which was

decided February 18, 1926, would have been startling under any circumstances. But these expressions were rendered still more inexplicable by the decision of the same court in the case of *Maffit v. City of Decatur*, handed down on June 16, 1926, and not yet reported. There the court held that the City of Decatur was not indebted beyond the constitutional limit under the following state of facts, set forth in the opinion:

“The new dam cost the city \$807,683.56. Its cost was defrayed, in part, by the issuance of \$601,000 in bonds. The city’s total indebtedness on April 4, 1921, including these bonds, was \$863,000. The assessed valuation of all property within the city, at the time, was \$16,479,320, five per cent of which, the maximum indebtedness permitted by the constitution, was \$823,966. There existed, however, a sinking fund created for the sole purpose of discharging *pro tanto* the city’s bonded indebtedness. On April 4, 1921, this fund consisted of \$75,975.10 in cash and \$21,535.41 in securities, and it was augmented by \$49,200 of the annual tax levy, a considerable portion of which had been collected. The sinking fund, apart from the tax levy, amounted to \$97,510.51 on the day in question.”

From the above it is quite clear that the court regarded the sum of \$97,510.51 in the sinking fund as a set-off to be deducted from the indebtedness of \$863,000, thereby bringing the debt within the constitutional limit of \$823,966.

The apparent discrepancy between the Stone and the Maffit decisions on the one hand, and the Wade decision on the other hand, was fully explained and reconciled when we examined the abstract and the two briefs filed in the Wade case. The writer was given access to these through the courtesy of Messrs. Chapman, Cutler & Parker, who had secured them for the purpose of ascertaining how the seeming inconsistency of the court had occurred. The abstract in question showed that the stipulation on which the court had based its decision did not even remotely suggest that any part of the cash on hand was set apart in a sinking fund for the

purpose of paying the bonds. On the subject of this money in hand it merely stated:

“9. That on August 7, 1920, The East Side Levee and Sanitary District had on hand in its treasury cash to the amount of \$185,943.68.”

Under these circumstances, it cannot be said that the Supreme Court had before it, in the *Wade* case, any question relating to the status of sinking funds in any shape or form whatever, and the apparent contradiction disappears. We are therefore justified in stating to you that the decisions in the *Stone* case and in the *Maffit* case are controlling, and that there has been no pronouncement on the part of the court which upsets them. The decisions in these cases are in harmony with the law in other states as laid down by their courts of last resort.

Rice v. City of Milwaukee, 100 Wis. 516;
Kelly v. City of Minneapolis, 63 Minn. 125.

Consequently, we beg to advise you that in computing the indebtedness of the City within the meaning of the constitutional limitation you should deduct the money on hand in the sinking funds from the bonded indebtedness.

Yours truly,

LEON HORNSTEIN,

Approved: *First Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Duty of Harbor Master with Reference to Safety of Vessels.

September 21, 1926.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

Inquiry has been made of this office in a communication dated June 22, 1926, based upon information received by

you from the Fire Department, as to whether or not Section 1745 of The Chicago Municipal Code of 1922 by its language is intended to place within the scope of the duties of the Harbor Master the regulation of the contents of any vessel in the harbor with reference to fire hazard which may be created thereby. Said section reads as follows:

“1745. *Location of vessels.*) The harbor master shall give such orders and directions relative to the location, change of place or station, manner of moving or use of the harbor of or by every vessel, craft or float lying, moving or laid up in the harbor, as may be necessary to promote good order therein and the safety and equal convenience of such vessels, crafts or floats, and to so regulate the same that the current in the Chicago river shall not be unnecessarily impeded by said vessels, crafts or floats.”

As you indicated in your communication, the words “safety and equal convenience of such vessels, crafts or floats” has reference merely to the relative positions of vessels when in the harbor district, and the title of the section, “Location of vessels,” bears out this interpretation.

Under the present ordinances, therefore, it is our opinion that you are not charged with the regulation and control of the contents of the vessels in question.

Yours very truly,

JAY A. SCHILLER,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Civil Service Employee in Outside Employment.

September 22, 1926.

HON. NICHOLAS R. FINN, President, Civil Service Commission.

Dear Sir:

Complying with your request for an opinion in the matter of the right of civil service employees to engage in outside employment while filling an office, position or place of employment in the service of the City, we state it as our opinion that, unless the ordinances defining the service and appropriating the compensation therefor, or the Civil Service Commission's classification of, or examination for, the service indicates otherwise, the presumption of law is such employee must devote his entire time to the City during its regular business and working hours. Such employee cannot, therefore, engage in outside employment at the same time.

You enclose with your communication the letter of a department head and invite our attention to it. This letter suggests "that in past years the Civil Service Commission had a rule forbidding employees in the classified service from engaging in outside employment, and making such rule a cause for discharge within the language of Section 12 of the Civil Service Law."

The adoption and existence of such a rule is not necessary to the power of the head of a department to discipline and subject to charges a subordinate who absents himself from the City's service to engage in outside employment.

Joyce v. City of Chicago, 216 Ill. 466, 473.

Kamman v. City of Chicago, 222 Ill. 64, 65.

Heaney v. City of Chicago, 117 Ill. App. 405, 411.

Respectfully submitted,

FRANCIS J. VURPILLAT,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,

Corporation Counsel.

Installation of Ornamental Lighting System Around City Hall and County Building.

September 22, 1926.

HON. JOHN T. MILLER, Commissioner of Gas and Electricity.

Dear Sir :

We have your letter of recent date in which you mention the proposed installation on the streets surrounding the City Hall and County building of ornamental lights similar to those about to be used on State street. You ask whether you have authority to expend money for this purpose from the appropriation set up on June 30, 1926 (Council Journal, page 3954) under Account 452-X-21.

The appropriation in question sets up an amount "to be expended under the direction and authority of the Commissioner of Gas and Electricity for the extension of the electric street lighting in the various districts in the City of Chicago." There are further words used in the appropriation indicating a very large measure of discretion on the part of the Commissioner.

It is plain from the language used that the general intention of the City Council is that there should be an extension of the street lighting system in the parts of the City that are not now lighted. At the same time it is evident from the wording of the appropriation that the Commissioner of Gas and Electricity is to be the judge of what constitutes such an extension, and that the Council does not seek to hamper him in this respect. The full responsibility for the handling of the fund is placed on him.

We would hesitate to give you an opinion to the effect that you can contract for extensive rehabilitation out of the fund thus appropriated. But where you determine, in the exercise of your best judgment, that the relatively small

amount of \$20,000 out of so large an appropriation as approximately \$1,800,000 should be used for the purpose of replacing existing lights, and that such replacement is a necessary or highly desirable part of the extension work, your determination would have to be regarded as within the power vested in you. We are of the opinion, therefore, that if you deem it a part of the extension work thus authorized, you may properly use such an amount as you say for the purpose indicated out of the said appropriation.

We return herewith the blue print showing the type of light you propose to install.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Application of Proceeds of South Water Street Improvement Bonds.

September 22, 1926.

HON. JOHN J. SLOAN, President, Board of Local Improvements.

Dear Sir:

In your letter of recent date you stated that you have a surplus in the South Water street condemnation assessment of about \$450,000 which you want to apply as far as it will go towards paying public benefits in the opening of Garland court, Holden court and Fork street, all of which form a part of the South Water street improvement. Later on in your letter you speak of the surplus in the "bond fund,"

and the letter of Mr. Crilly, acting attorney for the Board of Local Improvements, also speaks of the "bond fund" as if this was what you were inquiring about. We therefore assume that when you speak of the "condemnation assessment" you have reference to the money remaining in the South Water street bond fund.

Your inquiry is, whether you would be warranted in charging public benefits for the three collateral streets mentioned against this bond fund, and you state in particular that Mr. Crilly mentions Garland court but says nothing of the other two streets.

The bonds issued for the purposes of the South Water street improvement were provided for by two separate ordinances. One of them was passed July 21, 1919 (Council Journal, pp. 1020-21), the other on May 7, 1924 (Council Journal, pp. 2936-37).

In the first of these ordinances there was no mention made of the collateral streets of which you speak in your letter, although the ordinance made provision for improving other streets without mentioning them. Whether or not that ordinance could be construed as authorizing the payment of money for the improvement of such collateral streets is of no consequence, however, because the proceeds of those bonds have been expended.

In the ordinance authorizing the second bond issue it is stated that they are to be for the purpose of providing additional means for the payment of that portion of the cost and expense to be borne by the City of Chicago which has accrued and may hereafter accrue in the matter of widening and improving East South Water street and West South Water street "and improving, or widening and improving, or opening and improving such other streets or parts of streets as are connected therewith and form part of the same improvement, including River street, North Federal street, North Market street, Garland court, North Holden court and Fork avenue."

Clearly, the language used in the ordinance, which is included also in the wording of the bonds, authorizes the use of the funds derived from such bond issue for the improvement of Garland court and Fork street. It would seem from this that the meaning which Mr. Crilly intended to convey was that all those streets were mentioned and not merely the one street.

In our opinion, you have the authority to apply the surplus of the money in the said bond fund toward paying public benefits in the opening of Garland court, Holden court and Fork street in so far as these streets form a part of the South Water street improvement.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Location of Billboard in Commercial District.

September 22, 1926.

HON. JOHN J. HOELLEN, Alderman, 47th Ward.

Dear Sir:

Your letter with reference to billboard recently erected on premises at No. 1752 Montrose avenue was referred to the writer for consideration and reply. You state that since the erection of this billboard there has been considerable protest by neighboring property owners, who object to its erection and maintenance there on the alleged ground that it is detrimental to the community. You ask us whether there is a violation of the ordinances of the City and what steps, if any,

can be taken by the neighboring property owners to cause the removal of the objectionable sign. The owner of the property on which the billboard in question was erected seems to be within his rights. The place is within a commercial district under the Zoning Ordinance. Section 8 of that ordinance defining a commercial district permits C1, C2 and C3 uses, and among C1 uses an advertising sign is included in the enumeration given. The only way in which it would be unlawful to erect an advertising sign in a commercial district would be to place it in a block where one-half of the buildings on both sides of the street are used exclusively for residence purposes, in which event it would be necessary to secure the frontage consents for a majority of the frontage in the block. This is covered by Section 915 of The Chicago Municipal Code of 1922.

We have made inquiry to ascertain whether a majority of the buildings in the block of which you speak are used exclusively for residential purposes, and we find that they are not. Therefore, in our opinion, neither the property owners nor the City authorities can compel the removal of the sign concerning which you have made complaint.

When we made inquiry in the Building Department we were told that no permit had been issued for the billboard. If that is true, the person that erected same laid himself open to prosecution for failing to take out a permit. That, however, is a matter that we have not gone into more fully because it is a detail that will be looked after by the Department of Buildings.

Yours truly,

LEON HORNSTEIN,

First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Fees for Permits for Penny Arcades and Automatic Picture Machines.

September 22, 1926.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

This will acknowledge receipt of your letter of the 21st instant in which you advise us that application has been made to you for permits for pictures to be shown in penny arcades and automatic picture machines.

You state that there seems to be no provision in the general ordinances of the City of Chicago defining the fee to be charged for such permits and that a rate of \$3 per reel, as now charged, if applied to each subject shown in automatic machines would, in your opinion, be unreasonable and almost confiscatory.

You wish to be advised if under the provisions of ordinances now in full force and effect it is possible to determine the fee to be charged for the display of pictures in penny arcades and automatic picture machines. You indicate, however, that if the fee to be charged under the present ordinances are \$3 for each reel, you wish to be advised whether an amendment could be introduced reducing the exhibition fee to a rate that in your opinion would be reasonable.

Paragraph 2791 of The Chicago Municipal Code of 1922 is as follows:

“2791. *Fee for permit.*) The permit herein provided for shall be obtained for each and every picture or series of pictures exhibited, and shall be required in addition to any license or other imposition now required by law or ordinance. The fee for the original permit in each case shall be three dollars, and for each additional permit one dollar, which fee shall be paid to the city collector before the permits are issued. Such permit shall

be granted only after the motion-picture film for which said permit is requested has been produced at the office of the inspector of morals in the city hall for examination or censorship."

This paragraph clearly states that the fee for the original permit in each case shall be three dollars, and for each additional permit one dollar, and consequently we must state that there is no difficulty under the present ordinance to determine the fee to be charged in that the City Council has stated without any equivocation the permit fee.

Undoubtedly at the time of the passage of this ordinance this sum must have appeared to the City Council to be a reasonable and proper fee. Of course, this three dollar fee applies to "every picture or series of pictures exhibited," to motion pictures for which a considerable admission fee is charged as well as to pictures to be exhibited in penny arcades and automatic picture machines for which a very small exhibition fee is charged.

If you believe that a fee of three dollars for an original permit and one dollar for each additional permit to exhibit pictures in penny arcades and automatic picture machines is unreasonable, it is our belief that an ordinance should be presented to the City Council amending Paragraph 2791 of The Chicago Municipal Code of 1922 in its application to penny arcades and automatic picture machines. Until such time as Paragraph 2791 of the Code is amended, it is our opinion that the provisions therein should be enforced.

Very truly yours,

BARNET HODES,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Summary Abatement of Smoke Nuisance on Marine Craft.

September 23, 1926.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.

Dear Sir:

Your communication addressed to the Corporation Counsel relative to the powers of the Commissioner of Health to summarily abate nuisances caused by the smoking of marine craft operating in the Chicago river and harbor along the lake shore, has been referred to the undersigned for consideration and reply.

Specifically you ask whether or not the authority to take such action is vested in the Department of Health where violations occur while vessels are under way in the above locations.

Section 2123 of The Chicago Municipal Code of 1922 creates a division of air conditions control in the Department of Health and prescribes its duties.

Section 2124 prescribes the qualifications of the head of such division, and further provides:

“Under the direction of the commissioner of health, he shall have charge of the division of air conditions control, shall supervise and direct its operations, and shall be charged with the enforcement of all laws of the state and ordinances of the city relative to the purity of the air. He shall conduct, or cause to be conducted, investigations and studies of the condition of the air of the city and measures necessary to preserve the same in the highest possible degree of purity.”

Section 2129 provides that the smoke nuisance

“may be summarily abated by the commissioner of health or by any one whom he may duly authorize for such pur-

pose. Such abatement may be in addition to the fine hereinafter provided * * *."

In the case of *Harmon v. City of Chicago*, 110 Ill. 400 (1884), our Supreme Court held:

1. That an ordinance of the City of Chicago making the owners, etc., of tug-boats, etc., liable for the emission of dense smoke from their smokestacks, is not a violation of Section 8, Article 1, of the Federal Constitution, which declares that "Congress shall have power to regulate commerce. etc."

2. That such a regulation by the City does not impose any restraint on the use of such vessels, although engaged in general commerce, other than is consistent with law.

3. That controlling the use of tug-boats in towing vessels in and out from the harbor is in no sense in conflict with the power existing in Congress to regulate commerce with foreign nations.

4. That the existence of a power in Congress to control harbors, and the towing in and out of merchant vessels engaged in commerce with foreign nations and with the several States, does not of itself prevent local legislation for the security of property and the health, comfort and convenience of the people in a municipality.

5. That it is only repugnant and interfering State legislation that must give way to the paramount laws of Congress constitutionally enacted.

6. That a State has all power necessary for the protection of the property, health and comfort of the public, and it may delegate this power to local municipalities in such measure as may be deemed desirable for the best interests of the public.

7. That the court will take judicial notice of the fact that the City of Chicago is organized under the general Incorporation Act of 1872, and also that the Chicago river is situated in the midst of the City, where a dense population

exists, and near which much of the business of the City is transacted.

In the foregoing case a fine of fifty dollars imposed on Harmon in the Criminal Court was upheld.

The foregoing case is cited with approval by the Supreme Court of the United States (1915) in *Northwestern Laundry v. Des Moines*, 239 U. S. 486, at page 492.

Under the provisions of the ordinance hereinabove quoted, the enforcement thereof is placed squarely on the Department of Health through its proper officers. The foregoing, of course, has no relation to the right of a private citizen to institute injunction proceedings to abate such nuisance where he is shown to be specially damaged. Such right exists on behalf of anyone who suffers a special damage, irrespective of the ordinance providing a fine or for the summary abatement of such nuisance, or both.

As heretofore quoted and approved in our opinion of September 10, 1926,

"I would suggest that the remedy by abatement be employed by you in a manner harmonious with the revisions of the ordinance which govern the remedy by prosecution and fine; that is to say, before boilers are shut down or the fires drawn from under them, notice should be given to some responsible person in charge, and that this powerful and unusual remedy, while it should be employed with firmness, promptness and uniformity in all proper cases, is not an appropriate remedy in the case of commission of a first offense."

Respectfully submitted,

ROY S. GASKILL,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Fire Escape Interfering with Electric Light Wires.

September 23, 1926.

HON. LEO. J. WINIECKI, Commissioner of Public Service.

Dear Sir:

Your letter of the 14th instant, with reference to some controversy between the Commonwealth Edison Company and the American Bank Note Company, concerning the installation of a fire escape on the latter company's building now under construction at 1914 Indiana avenue, is received. We note that the fire escape if installed according to present plans would interfere with the transmission lines of the Edison Company and that the Edison Company contends that the Bank Note Company should pay the cost of replacing such transmission lines.

We do not know on what possible theory the Bank Note Company can be compelled to pay the controverted amount. We assume from your letter that the fire escape will be wholly within the lot lines of the Bank Note Company's property, and that company, of course, has an undoubted right to make any use of its property that is not in itself a nuisance, and the fact that the proposed construction will not leave the clearances required by the rules of the Edison Company or the Commerce Commission does not in our judgment constitute a nuisance. If the fire escape should by any chance project over the lot line of the Bank Note Company's property into the alley, that would clearly be an infringement and could and should be prevented. We assume, however, that this is not the case.

If the Edison Company and the Bank Note Company cannot agree between themselves on the proper method or design of construction, we do not know of anything that can be done either by your department or ours to compel the Bank Note Company either to change their plan of construction to

provide the required clearances or to pay the Edison Company the cost of relocating its transmission lines. The entire matter is purely a private controversy and much as we would like to be of service in settling disputes of this kind there is nothing that we know of that can be done about it.

Yours very truly,

JAMES J. COUGHLIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Rebuilding of Viaduct by Railroad Companies.

September 27, 1926.

COL. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

Your letter of July 27th last, concerning the rebuilding of the North Sangamon street and North Halsted street viaducts over the Chicago and Northwestern Railway, the Pennsylvania Railway and the Chicago, Milwaukee and St. Paul Railway Companies' tracks is received. Your letter requests that we prepare an ordinance providing for the rebuilding of these structures and submit it to the City Council for passage.

It appears that the construction of both viaducts was originally authorized and required by an ordinance passed April 1, 1872, granting permission and authority to the Columbus, Chicago and Indiana Central Railway Company to construct and maintain its railroad in certain streets in Chicago. Section 3 of that ordinance provides that the permission and authority granted are upon the express condition that the

grantee shall erect and maintain viaducts over its said tracks at Halsted, Sangamon, Lake and Madison streets within one year from the passage of this ordinance.

On July 28, 1873, the City Council passed an ordinance authorizing the Chicago and Northwestern Railway and Columbus, Chicago and Indiana Central Railroad to construct a viaduct over the tracks in Halsted street, and fixing the proportion of the cost to be borne by each company. It further provides that if the cost of construction shall exceed the amount fixed in the ordinance, such excess shall be paid by the City. The Pennsylvania Railroad Company subsequently succeeded to all the rights and property of the Columbus, Chicago and Indiana Central Railroad.

The only council order concerning the Sangamon street structure, which was passed on June 14, 1880, that we have been able to find is simply an order directing the Department of Public Works to advertise and let a contract for the construction of a viaduct at Sangamon street, and this order recites that an appropriation had theretofore been made for this construction. The order of May 23, 1892, mentioned in your letter directs that the Commissioner of Public Works notify the Chicago and Northwestern Railroad Company and the Panhandle and St. Paul Companies to commence at once the reconstruction of the North Halsted street viaduct in accordance with arrangements theretofore made with the Commissioner of Public Works. The order does not recite what the arrangements were.

The ordinance of April 1, 1872, requiring the Columbus, Chicago and Indiana Central Railroad Company to erect and maintain the viaducts over tracks at Halsted and Sangamon streets would seem to impose a continuing duty on that company and its successor, the Pennsylvania Railroad Company to provide a viaduct in both streets. How the Northwestern Road and the St. Paul Road are involved we are not advised, except by the ordinance of July 28, 1873, wherein the Northwestern Road is jointly authorized and directed with the Columbus, Chicago and Indiana Central Company to construct the Halsted street viaduct.

This ordinance makes no reference to maintenance, but simply provides for the original construction. The ordinance of 1872 does provide for maintenance. The council order of June 14, 1880, reciting that an appropriation had been made for the construction of a viaduct at Sangamon street, assuming that it is the same viaduct, would seem to indicate that the City assumed the responsibility for the construction of the viaduct on Sangamon street. The order of May 23, 1892, directing the Commissioner of Public Works to notify the Northwestern, Panhandle and St. Paul Railway Companies to commence the reconstruction of the Halsted street viaduct seems to indicate that the obligation of maintenance is upon the companies, although that order recites that the reconstruction shall be done in accordance with arrangements theretofore made with the Commissioner. What those arrangements might have been we have no means of knowing.

It is impossible for us, therefore, on either the information contained in your letter or on the strength of what we have been able to gather from these different council orders, to proceed intelligently with the draft of an ordinance for the rebuilding of these two viaducts.

Will you kindly furnish us with some information as to just what the terms and provisions of such an ordinance should be, and who is to do the rebuilding, the City or the railroad companies?

Very truly yours,

JAMES J. COUGHLIN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Supplementary Opinion on Rebuilding of Viaduct by Railroad Companies.

October 25, 1926.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

Supplementing our letter of September 27th, in reply to yours of July 27th concerning the rebuilding of the North Sangamon and North Halsted street viaduct over the Chicago and Northwestern Railway, the Pennsylvania Railway and the Chicago, Milwaukee and St. Paul Railway companies' tracks, we beg to advise that we have made a more extended search for ordinances or council orders that might tend to throw some light on the question of liability as between the carriers for the maintenance of these structures. We have been unable to find anything beyond those indicated in our former letter, and are of the opinion, therefore, that the provisions of the orders and ordinances therein referred to, together with apt provisions of the Railroad Act, constitute sufficient authority to justify a demand by the City upon the carriers involved to rebuild the viaducts mentioned.

Section 8 of an Act in relation to fencing and operation of railroads, approved March 31, 1874 (Paragraph 62, Chapter 114 R. S.), requires companies operating in this State to maintain their crossings so that at all times they shall be safe as to persons and to property. This has been liberally construed to mean that a railroad company subject to the provisions of the act shall maintain its crossings in whatever manner is best suited to the immediate local conditions. By the original construction of the viaduct in the streets in question the carriers recognized, as well as the City, that the proper method of effecting safe crossings at the streets maintained was by the construction of viaducts.

The required maintenance of approaches at the crossing, as provided by the statute, therefore, imposes the duty upon the carriers to rebuild the viaduct when necessary. If your department can agree with the different roads on a suitable program for the reconstruction of the viaducts in question, we see no immediate necessity for an ordinance unless it be an ordinance authorizing the execution of a contract between the City and the railroads, in the event that the agreement you may reach with them is one that should be reduced to contractual form. If the roads for any reason refuse to perform their duties as indicated, a mandatory ordinance should be prepared. This ordinance should be in the form usually employed for track elevation ordinances and should specify the manner and method of doing the work.

We are today notifying the above mentioned railroads to communicate with your department to the end that suitable arrangements may be made for the rebuilding of the viaducts in question.

Yours very truly,

JAMES J. COUGHLIN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Use of Funds Collected Under Special Assessment Warrant for Payment of Public Benefits.

September 28, 1926.

HON. JOHN J. SLOAN, President, Board of Local Improvements.

Dear Sir:

We have your letter of the 24th instant in which you say that there is a balance of approximately \$50,000 in the South

Water Street Bond Fund and about \$400,000 in the Condemnation Assessment Warrant levied for the same improvement. You ask whether you have the right to use this \$400,000 for the payment of public benefits on collateral streets connected with the South Water street improvement. You call attention to the fact that this \$400,000 is practically the 5 per cent allowed by law that is added to special assessment warrants in order to pay for sundry City services.

It would seem at the outset that what you are asking is to use funds collected as a tax from property owners to pay that portion of the tax which is assessed against the City and which is not supposed to come out of the property owners' payments. This can never be done, and in case there is an excess at any time, it must be returned to the property owners as a rebate.

The fact that the City is allowed 5 per cent for reimbursement of the corporate fund for costs and expenses does not mean that the City may use such money for any purposes that it desires. Section 94 of the Local Improvement Act limits the use of that money to the payment of "the cost of making, levying and collecting such special assessment or special tax, and of letting and executing contracts, advertising, clerical hire, engineering and inspection, court costs and fees of commissioners in condemnation proceedings incurred in such proceedings and deficiency in interest in the matter of such special assessment or special tax."

It will be seen at once that public benefits are not included in the enumeration given, and therefore there is no authority for using money which has been collected for such costs and expenses for public benefits.

If any citation is required to support this view it will be found in *City of Chicago v. Lake Forest University*, 293 Ill. 165, where the validity of the proviso authorizing the levying of this 5 per cent was questioned. In that case the court held the provision lawful but declared that the use of the money is limited to the particular improvement. It said (page 167):

“It is not within the power of a city to include in a special assessment the cost and expense of maintaining a board of local improvements or paying their salaries (*Betts v. City of Naperville*, 214 Ill. 380), but with the construction given, the five per centum does not include the cost and expense of maintaining the board of local improvements and paying the salaries of its members but only authorizes reimbursement of the corporate fund for advances made to pay the cost of the particular improvement. It was held in *City of Chicago v. Brede*, 218 Ill. 528, that bonds issued against a special assessment must be paid out of the assessment. If there is a deficiency it is to be first paid out of the five per cent, and we regard the provision as free from constitutional objection.”

City of Chicago v. Lake Forest University, 293 Ill. 165.

From this you will see that the money collected under the warrant for special assessment cannot be used for public benefits.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Loss of Property by Patient in City Hospital.

September 29, 1926.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.

Dear Sir:

We are in receipt of your communication of the 9th instant, relative to the claim of Miss May Lynn for the loss of a diamond, which you say disappeared while she was an

inmate of the Lawndale Hospital and while Miss Lynn was a patient there, after she had in accordance with the rules of the institution turned over the diamond together with other articles to Miss Smith, a nurse, to be retained until Miss Lynn's release.

We note your request for advice as to how the matter is to be handled. Were this simply a question regarding a tort or wrongful act of an employee of the hospital, we should have no hesitancy in saying that the City was not liable for the same, for the law is well settled that a City is not liable for the negligence and conduct of the employee of a municipal hospital.

13 R. C. L., page 944.

Tellison v. City of Ottawa, 213 Ill. 134.

Johnson v. City of Chicago, 258 Ill. 494.

While there may have been an element of negligence in this case, the claim is not, as we understand it, based upon a tort, but rather upon an implied contract of bailment, namely, a contract for the safekeeping and redelivery of the diamond. Here the nurse, under the instructions from the Commissioner of Health, and accordingly as a representative of the City, entered into an implied contract with Miss Lynn to safely keep the diamond for her and to redeliver it to her upon her discharge from the hospital. That, in our opinion, amounted to an implied contract of bailment.

It is true that the bailee is under such circumstances only bound to use ordinary care. Yet what constitutes ordinary care has always been held to be a question of fact for the jury. We are also of the opinion that the burden of proof in this case would be upon the City to show that the hospital officials had not been negligent.

Bennett v. O'Brien, 37 Ill. 250.

Schafer v. Washington Safety Deposit Co., 288 Ill. 43.

We are, therefore, of the opinion that the circumstances under which the hospital authorities received the diamond in

question constituted an implied contract of bailment. The burden of proof would be upon the City to show that the loss did not occur through the negligence of its agents or servants.

With reference to your request as to what further steps are to be taken, we have no suggestion if you believe that your investigation has been as thorough as is practicable. The matter would have to be disposed of when claim is made by application to the City Council or through suit.

Very truly yours,

EDWARD M. QUINN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Pension Rights of Policeman on Disability Pension Returning to Active Service.

September 29, 1926.

RETIREMENT BOARD, POLICEMEN'S ANNUITY & BENEFIT FUND.

Gentlemen:

Replying to your request of September 17th, for an opinion as to the pension rights of a policeman on disability pension who returns to active service, the following is submitted:

Your letter states that Sergeant Wertheimer resigned from the Police Department on July 16, 1926; that he has a net service to his credit (exclusive of a period during which he was on disability pension under the old law) of 22 years, 3 months and 5 days; that he was 50 years of age on September 9, 1925; that according to the records of your office he was the recipient of a disability pension from August 16, 1918, to

and including December 31, 1921; that the records of the department show that he returned to active duty on January 6, 1922.

Your letter asks two questions, namely :

1. In view of the fact that Sergeant Wertheimer was not on active duty on December 31, 1921, whether or not he should be classified as a "present employee" and as such entitled to the benefits of Section 55 of the Act of 1921.

2. What rate of salary (as of January 1, 1922) should be used as the basis of his prior service credit, his actual salary at the time he entered on disability pension in 1918 being \$1,600.00 per year."

I.

The question as to whether or not Sergeant Wertheimer is to be classified as a "present employee" need not be considered, because his rights are fixed by the Police Pension Act of 1915, as amended in 1917, which rights are preserved to him by Section 50 of the Policemen's Annuity and Benefit Fund Act.

In Opinion No. 728, rendered December 6, 1924, in the case of the annuity rights of John Cunningham, it was held that a policeman placed upon disability pension under the law in existence prior to the present act continued to be a member of the Police Department, and that his retirement upon disability pension was merely a retirement from active service. When Sergeant Wertheimer returned to active duty on January 6, 1922, he could not be considered to have "re-entered" the service because he was never separated from the service; he merely changed his status in the service from that of a policeman temporarily retired because of disability to that of a policeman in active service after recovery from disability.

When Sergeant Wertheimer was placed on disability pension in 1918, there was in force and effect the Police Pension Act of 1915, as amended in 1917; when the present act came

into effect, his pension payments were continued to him pursuant to Section 50 of the Act of 1921, which section provides, among other things, that any pension allowed prior to January 1, 1922, by a prior Police Pension Board should be paid by your Honorable Body from the Annuity and Benefit Fund, according to the law or laws under which such pension was allowed.

Section 4 of the Act of 1915, as amended in 1917, provided for the retirement on pension of a policeman who had become physically disabled, and further provided that whenever such disability should cease then such pension should cease and such policeman should be reinstated to active service in the department in the rank held by him at the time of his retirement.

The right to be reassigned to active duty upon recovery from disability was and is a legal right guaranteed to a policeman in the Police Pension Act of 1915, as amended.

The Act of 1915, as amended in 1917, also provided that after twenty years of active service and the attainment of the age of 50 years, a policeman should have the right to retire and to be paid a pension of a certain specified amount, the highest amount being \$1,300 per annum and the lowest amount \$600 per annum.

In the Police Pension Act of 1921, the Legislature, in Section 55 thereof, abolished the graded pension allowances and established a fixed pension of \$1,300 per annum for all men who retired after twenty years of active service and who had attained 50 years of age and whose annuities should be less than \$1,300.

It is not to be believed, nor can the Policemen's Annuity and Benefit Fund Act reasonably be construed to intend, that policemen returning to active service after being temporarily disabled, including those disabled in the performance of duty, should be deprived of any rights granted to policemen who had never been disabled, nor would it be a constitutional provision of the law unless all policemen in the same grade and of the same class had the same rights.

It appears, therefore, that Sergeant Wertheimer has the same right to retire after twenty years of active service and the attainment of the age of 50 years as has any other member of the Police Department; and since the only provision contained in the present Policemen's Annuity and Benefit Fund Act as to the amount of pension to be paid to policemen retiring after twenty years of active service and having attained the age of 50 years is the provision contained in Section 55 of the act relative to the payment of one-half salary, Sergeant Wertheimer would be entitled to the same pension as any other policeman in the same class who had served twenty years and had attained the age of 50, viz, one-half his salary as such salary shall be at the time of his retirement but not in excess of \$1,300 per annum.

II.

As Sergeant Wertheimer was not in active service on January 1, 1922, but was a member of the Police Department entitled to be reinstated to active service upon recovery from his disability, and since he was actually so reinstated, the only rate of salary (as of January 1, 1922) which can be used as the basis of his prior service credit, is the salary attached to the rank in the department to which he was entitled to be restored upon recovery from his disability, and to which he was actually so restored.

III.

I am of the opinion that so far as concerns a policeman who was in receipt of a disability pension at the time the present act came into force and effect and who subsequently recovered from such disability and was reassigned to active duty, the present Annuity and Benefit Fund Act preserves all rights conferred upon him by the Act of 1915, as amended in 1917, and that such policeman is entitled to be retired upon the pension provided in Section 55 of the Policemen's Annuity and Benefit Fund Act the same as if there had been no

interruption in the period of his active service, excepting that the period of time during which he was in receipt of disability pension cannot be credited as a period of active service for annuity or benefit purposes.

I am of the further opinion that the salary of the rank in the Police Department held by Sergeant Wertheimer at the time of his retirement on pension, as such salary was on January 1, 1922, should be used as the salary basis in the computation of prior service credit for the purpose of proper allocation to the several pension accounts of the annuity payments.

Respectfully submitted,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Stone-Cutting in Manufacturing District.

September 29, 1926.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

This will acknowledge receipt of your letter of September 28th enclosing a communication from the Fluck Cut Stone Company and requesting the views of this department.

The Fluck Cut Stone Company, it appears, according to their letter as well as according to a bill for injunction against you filed in the Superior Court, was granted a permit on August 26, 1926, to erect a one-story brick building 90 feet by 257 feet deep at 1229-1235 East 74th street. These premises are placed by the Zoning Ordinance in a manufacturing district.

Some work was done under the permit and the building, when completed, they state, is to be used for the purpose of dressing or cutting stone.

"The conduct of our business," it is further stated in the letter, "does not customarily emit dust, gas, smoke, noise, fumes, odors or vibrations which may be offensive or noxious to the adjacent uses, and does not injure the operation of the adjacent uses, nor does, nor will the operation of our business or the use of our property in any manner injuriously affect the occupation of adjacent uses, and it will be so operated at all times that it will not emit dust, gas, smoke, noise, vibrations, odors or fumes of a disagreeable or annoying nature."

September 28, 1926, you advised the Fluck Cut Stone Company that you had revoked the permit for the construction of the aforesaid building because it violated the provisions of the Zoning Ordinance.

You wish our advice as to whether or not the Fluck Cut Stone Company has a right to erect the building for the uses and purposes set forth in their letter, taking into consideration that the erection of the building is contemplated on ground now zoned for manufacturing purposes.

These premises, as you state, are in a manufacturing district. "Stone, marble, or granite grinding, dressing, or cutting" is classified by the Zoning Ordinance as an M1 use. An M1 use is permitted anywhere in a manufacturing district regardless of its distance from any other district.

The general definition of an M1 use is as follows:

"M1 Use.—An M1 use shall include such storage, manufacturing or other uses of property coming within the definition of an M use as do not injuriously affect the occupants of adjacent uses and are so operated that they do not emit dust, gas, smoke, noise, fumes, odors, or vibrations of a disagreeable or annoying nature."

It is expressly stated in the letter of the Fluck Cut Stone Company that the proposed building is to be used for the

purpose of dressing or cutting stone and that it will not be operated contrary to the general definition of an M1 use. Thus the use is one specifically classified as an M1 use and in addition is to be operated in conformity with the general definition of an M1 use. That being the fact, we think they have a right to erect the building.

After the building is erected, if it develops that the business should be operated contrary to the definition of an M1 use, you have ample authority to prevent the continuance of the same, but you should not assume in advance that they intend to violate the law when they state that they intend to comply with it.

In our opinion the Fluck Cut Stone Company has a legal right to erect this building.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Revolver Carried in Automobile as a Concealed Weapon.

September 30, 1926.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

Your letter of September 24, 1926, to the Corporation Counsel has been referred to the writer for reply. We quote your letter:

“The 1925 Session Laws, page 339, pertaining to carrying of concealed weapons makes it an offense to

have a deadly weapon, to wit: a pistol, revolver, stiletto, etc., on or about the person.

Will you kindly favor me with an opinion as to whether or not the section above referred to includes a revolver carried in an automobile where the driver would have access to the same."

We are assuming that the request for this opinion is based upon the recent decision of the Illinois Supreme Court entitled *People v. Sheldon*, reported in 156 North Eastern, at page 567 (advance sheets). There is a supposition that in this case the court held that having a pistol, revolver or other firearm in an automobile is not a violation of Section 4 of the Deadly Weapon Act of 1925.

In the *Sheldon* case above referred to the court did not pass upon the question of whether or not carrying a gun in an automobile was violating Section 4. The court passed upon the sufficiency of an information filed which charged that the defendant "did then and there knowingly and unlawfully have in his possession on a seat in a certain automobile a certain deadly weapon, to wit, a loaded revolver, and was not then and there legally authorized so to do, in violation of Section 1, Senate Bill 348, in effect July 1, 1925." Inasmuch as Section 1 of the Deadly Weapon Act of 1925 does not include a firearm, the court held that the information was faulty.

By carefully scrutinizing the Act of 1925, you will note that Section 1 does not specifically mention a revolver, while Section 4 of the same act recites that "no person shall carry concealed on or about his person a pistol, revolver or other firearm." The second paragraph of your letter indicates that you are particularly interested in knowing whether or not a revolver carried in an automobile would be sufficient to charge the occupant of the automobile with violation of Section 4, and our opinion will be confined to that query.

The Supreme Court of Texas decided the case of *Garriett v. State*, reported in 25 S. W. Reporter, at page 285, wherein

a man was charged with and convicted of having on or about his person a pistol. We quote the synopsis of that opinion:

“Evidence that one had a pistol on the wagon seat on which he sat is sufficient to support a conviction under a statute providing a penalty for carrying a pistol on or about the person.”

The only difference between the Texas Statute and ours is that the word “concealed” does not appear in Article 338, Chapter 4 of Willson’s Texas Criminal Statutes, Fourth Edition, 1896.

Section 1005 of the North Carolina Code prohibits the carrying of a concealed weapon “about” one’s person while off his own premises. In *State v. McManus*, 89 North Carolina, at page 555, the court held:

“That where a person carried a pistol in a basket, which he held in his lap he was carrying a concealed weapon about his person.”

In *Warren v. State*, 94 Ala., page 79, the court uses the following language:

“One who carries a pistol, concealed, supported by a strap on his shoulder is guilty under an Act making it unlawful to carry a weapon concealed about the person.”

In *Hardy v. State*, 37 Texas Criminal Reports, page 511, the court held:

“Carrying a pistol in a box in the wagon in which defendant is riding is not carrying on or about his person.”

In *Thompson v. State*, 48 Texas Criminal Reports, page 146, the court held:

“Neither does carrying a pistol on cotton half-way between the seat and the rear of the wagon violate the statute.”

The Deadly Weapon Act of 1925 repealed the Sadler Act of 1919. Under the Sadler Act it was a violation to carry or

possess without a permit a pistol, revolver or other firearm, and the courts held under the 1919 Act, that for a man to have a revolver in his automobile did not constitute the carrying and possession of such revolver. It is to be assumed, therefore, that the Legislature of 1925 intended to cure that defect in the law when it used the words "on or about the person" in the Statute of 1925.

The decisions above quoted from draw an obvious distinction between a revolver carried in an automobile in close proximity to the person and so as to be readily accessible even though not actually on the person, and one carried at a place in the car in such a way that it cannot be used instantaneously. In the latter case the presumption of law would be that the weapon was being lawfully transported, but a party cannot excuse himself by the claim that he is merely transporting the weapon, and this presumption must give way when it appears that the weapon was carried within such easy reach as to be ready for instant use.

Yours very truly,

JAMES I. McCARTHY,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Illuminated Sign on Hotel in Residential District.

October 4, 1926.

HON. JOHN T. MILLER, Commissioner of Gas and Electricity.

Dear Sir:

This will acknowledge the receipt of your letter of September 30th relative to application for permit for an illuminated sign to be placed upon the Shoreland Hotel, 5454 South

Shore drive. You wish to be advised whether the ordinances preclude the issuance of the permit.

From information presented to us it appears that the permit for the hotel building was taken out before the Zoning Ordinance became effective, that the hotel is away from the main traveled thoroughfare, that the premises upon which the hotel is erected are placed by the Zoning Ordinance in a fifth volume apartment district, that a hotel is expressly permitted in an apartment district, that the sign is to be placed flat against the hotel building near the top thereof entirely upon the hotel property, and that the sign is to contain only the word "Shoreland," which is the name of the hotel.

Several months ago we advised the Commissioner of Buildings in an altogether analogous case that the Pearson Hotel was within its legal rights in placing upon the hotel structure an illuminated sign bearing only the words "Hotel Pearson." (Opinions of Corporation Counsel, April 22, 1926.)

"From information before us," that opinion stated, "it appears that the permit for the construction of the hotel building was issued November 22, 1922, about six months before the zoning ordinance of the City of Chicago became effective. In the communication from the hotel corporation it is also stated that the hotel is in a place that is not near the main traveled thoroughfares, and that such a sign is necessary for that reason, and that it is an almost indispensable guide to the hotel guests who are strangers in the City.

"Inasmuch as the building in question was started before the zoning ordinance became operative, such illuminated sign limited to the name of the hotel, and used as this will be, for the purpose of guiding its guests to their destination, is within the rights of the Hotel Corporation. We recommend the issuance of the permit."

What we said in reference to the permit for the sign upon the Hotel Pearson applies to the proposed sign upon the Shoreland Hotel.

As the permit for the Shoreland Hotel was taken out before the Zoning Ordinance became operative, as the hotel is in an apartment district in which hotels are expressly permitted, and as the hotel is away from the main arteries of travel, we think an illuminated sign upon the hotel building limited as this will be to the name of the hotel for the purpose of guiding its guests to their destination is within the rights of the hotel corporation.

Accordingly, it is our opinion that the permit for the above described sign for the Shoreland Hotel may be issued, provided, of course, that the sign complies with all the ordinances of the City in respect to the safety thereof.

As the Commissioner of Buildings is the enforcing officer of the Zoning Ordinance, we are taking the liberty to forward to him a copy of this opinion.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Drapes in Audience Rooms of Theatres.

October 4, 1926.

MR. JOHN PLANT, Chief Fire Prevention Engineer.

Dear Sir:

This will acknowledge the receipt of your letter of September 30th requesting the views of this department.

The New Palace Theatre, 157 West Randolph street, has been lately completed and, you are informed, will be opened to the public on October 4th.

“An inspection of this theatre,” you state, “shows that there are combustible drapes in the audience room. The drape directly over the proscenium arch outside of the steel curtain is supported on a wooden truss which, we believe, is a violation of Section 1337, Paragraph (h), of The Chicago Municipal Code of 1922.”

You have sent to the owners, architects and lessees of the theater notices of the violations alleged, in conformity with Section 1276 of The Chicago Municipal Code of 1922, and you wish to be advised what course you should pursue to bring about prompt compliance by the theater authorities with the provisions of the fire prevention ordinances.

We take it that the question presented is, what are your rights and duties in the premises in case the theater authorities fail to abate the violations of the ordinances which you state exist at the present time and concerning which you have served due notice upon them.

This department has heretofore written an opinion to the General Superintendent of Police (Printed Opinions of Corporation Counsel of 1923-1924, page 713), which, we believe, fully covers the situation.

That opinion reads as follows:

“In response to your verbal request for an opinion from the Corporation Counsel outlining the powers and duties and proper procedure to be followed by the superintendent of police, the chief of fire prevention and public safety and the building commissioner of the City of Chicago with relation to the violation of the fire prevention ordinances by theaters, and particularly with regard to the right of the City to close the same, we desire to submit the following:

“The following sections of The Chicago Municipal Code of 1922 enjoin upon the chief of fire prevention and public safety and upon the superintendent of police, certain duties as follows:

(There are then set forth in the opinion *in haec verba* Sections 1276, 1278, 1279 and 1532 of The Chicago Municipal Code of 1922.)

“An inspection of the above quoted sections of the fire prevention ordinances shows that section 1276 (d)

provides, when any building, structure or place does not comply with the requirements of the fire prevention ordinances, it is unlawful to continue the use of or to occupy the same until a compliance with the said ordinances has been obtained. Section 1279 of the above quoted ordinances further provides that the chief of fire prevention and public safety may call upon the superintendent of police and the department of police for aid in carrying out or enforcing any of the provisions of the said ordinances. In other words, it is prescribed that whenever a violation of the fire prevention ordinances takes place, the chief of fire prevention and public safety may stop the use or occupation of the building, structure, or place, constituting such violation, and the superintendent of police is required to aid in preventing such unlawful use.

“The only question which might be raised, then, would be the question of whether the aforequoted sections of the fire prevention ordinances requiring a building which does not comply with the said ordinances to be closed, are valid ordinances which can be sustained in the courts. The legislature has expressly granted to municipalities the power summarily to abate nuisances. (Clause 75, Sec. 1, Art. V, of An Act to provide for the incorporation of Cities and Villages, approved April 10, 1872, in force July 1, 1872.) The validity of this grant of power has been upheld in the case of *Roberts v. Ogle*, 30 Ill. 459. Furthermore, the courts have frequently held that when buildings are erected within the city limits which constitute in fact a nuisance in that they are a menace with respect to the hazards of fire and, because of their faulty construction, may endanger the lives and safety of people within them should a fire occur, the city authorities may summarily tear them down. In such a case it is not necessary for the chief of fire prevention and for the superintendent of police to act under order of court or court authority. When a building or structure is clearly dangerous from the point of view of fire prevention, it then becomes the duty of the chief of fire prevention and of the superintendent of police to close the same to the use of the public. If the danger in the said building or structure exists in the failure of the building to provide adequate means of egress from the building in case of fire, or inadequate sprinkler system or fire apparatus as required by the

fire prevention ordinances, the use of the building by the public should be prevented until these faults have been remedied. However, if the *construction* of the building itself constitutes the menace, for example, if a wooden building were erected within the city fire limits, then the building itself may be torn down, and this nuisance thereby summarily abated. That the city has power to proceed as above outlined, has been clearly and definitely decided by the Supreme Court of Illinois, in the case of *King v. Davenport*, 98 Ill. 305. The same question has also been passed upon in the case of *Nazworthy v. City of Sullivan*, 55 Ill. App. 48; *Meltzer v. City of Chicago*, 182 Ill. 334, and *Patterson v. Johnson*, 214 Ill. 481, 488.

"The exercise of the police power for the prevention of the dangers of fire is essential to the prevention of the welfare and safety of the public. Although its application may, in practice, result in hardship in certain instances, nevertheless the lives of the citizens are of paramount importance, and any momentary hardship to the owner of buildings is of minor importance.

"It should be noted that the city is never justified in proceeding in an unreasonable manner under its police power. If the violation of the fire prevention ordinances constitutes merely a technical violation without creating a condition which is in fact dangerous to life or property, then the building or structure should not be arbitrarily closed, but the matter should be placed in the hands of the prosecuting attorney for the purpose of instituting suits to recover the penalty prescribed for the violations of the fire prevention ordinances. But, whenever in the opinion of the chief of fire prevention a violation of the fire prevention ordinances exists which creates a condition from which danger to life or property from fire may arise, then it is the duty of the chief of fire prevention and of the superintendent of police to stop any further use of the building by the public. This is particularly applicable where a license to operate a theatre, hospital or other similar enterprise has been revoked because of a failure to comply with fire prevention ordinances."

The ordinances referred to in the above opinion have not been repealed or amended and are in full force and effect at the present time.

We feel that that opinion is a correct expression of the law, and we respectfully submit the same to you for your consideration and guidance herein.

We are also taking the liberty of calling your attention to Section 1345 of The Chicago Municipal Code of 1922, which reads as follows:

“1345. *Certificates Required Before License Is Issued.*) No license shall be issued to any person, firm or corporation to produce, present, conduct, operate or offer for gain or profit, any theatricals, shows or amusements, until the chief of fire prevention and public safety shall first have certified in writing that the room or place where it is proposed to produce, present, conduct, operate or offer such theatricals, shows or amusements, complies with the provisions of this chapter.”

We are returning to you herewith copy of the notice which you enclosed.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Proposed Refund of Fine Assessed by Municipal Court.

October 6, 1926.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

We are in receipt of a letter signed by the Deputy Comptroller, in which he calls attention to the claim of Mrs. Catly Martin for refund of money paid for fine and costs imposed

on her husband, Pearl H. Martin. Attached to said letter is a communication to you from the Chairman of the Finance Committee, claim presented to the Finance Committee, a letter from the attorney of the Legal Aid Bureau and a copy of a letter from the Director of the Psychopathic Hospital to the Legal Aid Bureau, a branch of the United Charities of Chicago. You ask whether the defendant in the case in which the fine was imposed is entitled to a refund.

From the papers above set forth, together with memorandum in pencil attached thereto, it appears that on February 3, 1925, in case No. 1825943 in the Municipal Court, Pearl H. Martin was found guilty of the violation of Section 2655 of The Chicago Code of 1922, by Judge Schulman; that the case was tried by the court and that a fine of \$200 with costs of \$6.50, a total of \$206.50, was imposed; that in default of payment he was committed to the House of Correction for nonpayment of fine. It further appears that on February 25, 1925, the balance of the fine which had not been paid by the 22 days of service, and the costs, was paid at the House of Correction and the prisoner released. The sum so paid was \$195.50. On March 6, 1925, Judge Schulman, on motion of defendant, vacated the judgment of February 3, 1925, except as to such part of the penalty as had been served. It further appears that on February 26, 1925, the defendant was taken to the Psychopathic Hospital and found to be insane, and it is stated that his insanity preceded the trial and explains the peculiar behavior which resulted in his fine and imprisonment.

While these facts present an extraordinary case and one in which a refund would unquestionably be proper if it could be regularly ordered, we are constrained to say that there does not appear to be any lawful way of doing this.

The question of the jurisdiction of the Municipal Court after the commitment of a prisoner in the House of Correction has come before us a number of times recently, and we have always held that such jurisdiction is lost when a person is committed to a penal institution. This rule applies in the

case of violations of ordinances as well as in the case of infractions against the state law. In addition to that we here have a complete satisfaction by the working out and payment of the judgment.

We know of no way in which an executed judgment can be set aside. Even the City Council has not the authority to order a refund because such action on its part would amount to the giving away of City funds. We are, therefore, bound to say that a refund under the circumstances would be contrary to law.

Yours truly,

LEON HORNSTEIN,

First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Scope of Study of Pension Matters by Pension Commission of Chicago.

October 7, 1926.

MR. GEORGE C. SIKES, Secretary Pension Commission of Chicago.

Dear Sir:

Your letter concerning the resolution offered on behalf of the teachers at a recent meeting of the Pension Commission of the City of Chicago, and asking for an opinion thereon, was referred to the writer for attention.

You state that at the said meeting Mr. I. T. Greenacre, representing the teachers, spoke against the Pension Commission making recommendations for amendments to the Chicago Teachers' Pension Law, and offered the following resolution:

“Resolved, By the Pension Commission of Chicago that the authority granted to the Commission by the City Council on May 13, 1925, ‘To make a comprehensive study of pension matters and report their findings and recommendations to the City Council with a view of recommending amendments to Illinois Pension laws that are deemed necessary,’ does not include authority to make findings and recommendations to the City Council recommending amendments to the Chicago Teachers’ Pension Law.”

You further state that, after considerable discussion of the subject, it was determined that the Corporation Counsel should be asked for an opinion as to the right of the Commission to inquire into the management of the Chicago Teachers’ Pension Fund, Chicago Public Library Pension Fund, and House of Correction Pension Fund, and to make recommendations concerning such funds.

The order of the City Council under which the Pension Commission was appointed was passed on May 13, 1925. (Council Journal, P. 251.) It contained a preamble reciting, among other things, that there were a number of bills pending before the Legislature bearing on pensions of municipal employees, that the various pension funds aggregated large sums, and that the taxpayers were interested in an intelligent, business-like and honest administration by the various pension boards. This was followed by the order, which reads:

“Ordered, That His Honor the Mayor is hereby directed to appoint a commission to make a comprehensive study of pension matters and report their findings and recommendations to the City Council with a view of recommending amendments to Illinois pension laws that are deemed necessary.”

It would seem from the wording of the order that it was the intention of the City Council that the Commission should make a study of all pension matters in which the people of the City are interested, regardless of where the control or seat of power with respect to each individual fund is lodged,

and then to make such recommendations as it deems proper as to any or all of them.

There is nothing unusual or improper in the City Council making recommendations for legislation which affect the people of the City as distinguished from the municipality as a corporate entity. The taxpayers of the City are necessarily concerned, and any law which affects them has such a distinct and positive bearing on the affairs of the municipality that the Council is justified in making investigations and recommending legislation relative thereto.

Hence, viewed broadly, there can be no question of the right of the Commission to inquire into the management of the various pension funds mentioned. Such inquiry, in the case of the Library Fund and the House of Correction Fund, may even partake of the nature of an investigation into expenditures, and an examination of accounts, since these are branches of the City government for which the officers of the City and the Council are in a large degree responsible. A somewhat different status exists with respect to the School Pension Fund, that being under the jurisdiction of the Board of Education, which is defined by statute as a body politic and corporate. It is doubtful whether the Commission would be justified in demanding statements or an exhibition of accounts or minutes of meetings as to this fund, though it may make such inquiry as is within its reach and examine available data. So far as recommendations for legislation as to such matters are concerned, however, we know of no limitation on the City Council, and we believe the Council by the resolution above quoted has authorized the Commission to go into the subject.

The writer interviewed Mr. Greenacre in regard to his attitude, and it would seem that he urges two points. One of these is that the City Council, while it has the power itself to extend the scope of the inquiry to the Teachers' Pension Fund, has not conferred such power on the Commission. To this we cannot agree, as we have already shown.

The other point is that it had been indicated to those interested in the Teachers' Pension Fund that no recommendations as to legislation would be made without giving them a hearing, but that it was now the intention to make such recommendations without such hearing. With this, of course, this department has nothing to do, and no legal question is involved. It would seem as though inquiry had been made on this point and that the Mayor was informed from this department that the author of the resolution had no intention of making an investigation of the Teachers' Pension Fund. (See letter addressed to the Mayor under date of March 9, 1926.)

Yours truly,

LEON HORNSTEIN,

First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Rights of Minor Child Born after Father Attains Age of 65 Years.

October 8, 1926.

THE RETIREMENT BOARD OF THE MUNICIPAL EMPLOYEES' ANNUITY AND BENEFIT FUND.

Gentlemen:

Replying to your request for an opinion as to the annuity and refund rights of a minor child born of a municipal employee after such employee attains the age of 65 years, the following is submitted:

The letter states that Dr. H. Spalding, Bureau Chief, Department of Health, died on September 22, 1926, at the age of 74 years; that at the time Dr. Spalding filed his infor-

mation sheets with your Honorable Body on December 9, 1921, he stated that he was not married; that it appears that he later married Lagreta M. Dunn on August 9, 1924, and that a child was born of that union on May 29, 1926.

Your letter also states that the date of Dr. Spalding's birth as shown on the information sheet is September 10, 1852, and that the date of birth on the marriage certificate shows his age as 51 years.

Section 61 of the M. E. A. & B. Fund Act provides that the age of any municipal employee as stated in his application for appointment to the service of the City shall be conclusive evidence of the age of such municipal employee for the purposes of the act. I assume the "information sheets" referred to in your letter show the date of birth of Dr. Spalding as given in his application for appointment to service. This would indicate that Dr. Spalding was 74 years of age at the time his child was born.

Section 45 of the M. E. A. & B. Fund Act provides for the payment of a child's annuity only when such "child had been born before such municipal employee attained the age of 65 years, and before he shall have resigned or been discharged from the service." As the child in question was not born before Dr. Spalding attained the age of 65 years, the child is not entitled to any annuity.

Section 39 (e) of the M. E. A. & B. Fund Act provides that whenever an amount equal to the total amount accumulated and credited to the account of the deceased municipal employee, all sums deducted from the salary of such municipal employee for annuity purposes, and sums deducted from his salary or otherwise paid by him into any municipal pension fund described in the act, shall not have been paid to such municipal employee or to the widow of such municipal employee both together, in form of annuity before the death of the last of such persons who shall die, an amount equal to the difference between the sum of such amounts and the entire amount paid in form of annuity or annuities, without interest upon either such amounts, shall be refunded and

paid to the children of such municipal employee in equal parts unless such municipal employee shall otherwise direct as provided in this section. The "widow" mentioned in the section refers only to a widow entitled to annuity, and when a municipal employee dies leaving a widow not entitled to annuity and a child not entitled to annuity then the refund is payable to his children. In the case of Dr. Spalding, you have mentioned only one child, and that one a minor child born May 29, 1926. If there are no other children, then the entire refund is payable to the child mentioned, after the appointment of a guardian by the Probate Court of Cook County authorized to receive and receipt for said moneys.

I am of the opinion that the minor child of Dr. Spalding is not entitled to any annuity but is entitled to the entire amount of refund of salary contributions and deductions; that a guardian must first be appointed for said child before any payment can be made; and that the application for such refund must be made by the guardian so appointed, together with an affidavit as to the minor being the only child of Dr. Spalding.

Yours respectfully,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Power of City in Regard to Drapes in Theaters.

October 8, 1926.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

Your letter of recent date concerning the general violation of the ordinance requiring the audience rooms of thea-

ters to be free from drapes, was referred to the writer for reply.

You state that since the entry of the order in the case of *People ex rel. Ascher Terminal Theater Co. v. Connery*, the handicaps that you have experienced in enforcing this ordinance have increased until there is at present a disturbing situation. You ask first whether this case has been appealed, and next what the duties of the Fire Prevention Bureau are under the circumstances. You state further that all theaters claim that, under the decision of the court in the case referred to, they have the right to refuse to remove the drapes on the order of the Fire Prevention Bureau.

A complete answer to the contention of the theater owners is that the judge who entered the order in the *Ascher* case had before him testimony of that particular theater and no other theater. If an accident should happen in any of the other theaters that is now violating the ordinance, the judge who entered this order would undoubtedly say that he entered the order in regard to the *Ascher* theater after he had heard testimony in regard to it and had come to a conclusion as to conditions there, but that his order did not apply to any other theater in the City. Consequently, in spite of this decision, the responsibility still rests upon the Fire Prevention Bureau to enforce this ordinance. This is especially true in view of the fact that it was not contended in the *Ascher* case that the ordinance was invalid, but merely that it was to be interpreted as applying in cases where the material was not fireproofed. The case has been appealed, and no question having been raised as to the validity of the ordinance, that is not being argued in the Appellate Court.

We are informed by your letter that the claim is made on all hands that the drapes in question are fireproof, but that you have no facilities for ascertaining whether or not they are actually fireproofed with the solution that prompted the court to enter its order. It would be necessary to take down all the drapes, and, in many cases, injure them, and then you would not be certain whether or not they are so thor-

oughly fireproof that the danger is removed. Nor can it be stated with any degree of assurance that even if thoroughly fireproof at the present time the protection will remain to safeguard the public for any length of time. We understand that this fireproofing solution in the course of time becomes ineffective.

In view of the situation that presents itself, we recommend that you begin action under the ordinance against each individual theater that has hung drapes contrary to the ordinance. These prosecutions should be begun by summons, and the responsibility should be placed upon the courts, if they see fit to take it. It is our belief that this ordinance is valid and enforceable and that it is not the province of the courts to render it nugatory by court action. Hence, the duty is incumbent on you to start the prosecution. In case the Municipal Court judges before whom these actions are brought see fit to hold against you or to defer hearing the case until there is an authoritative decision from the Supreme Court, they will take the responsibility and relieve you of it. We make this recommendation, not for the purpose of enabling you to shift responsibility, but to bring the matter to a head in such a way that the Fire Prevention Bureau's orders strictly in line with the ordinances may not be totally ignored, as is the case in many instances at the present time.

Yours truly,

LEON HORNSTEIN,

First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Re-examination of Disability Pensioners.

October 9, 1926.

THE BOARD OF TRUSTEES OF THE FIREMEN'S PENSION FUND.

Gentlemen :

Replying to your request for an opinion as to the duty of your Honorable Body in the matter of the re-examination of all disability pensioners, the following is submitted :

Section 5 (e) of the Firemen's Pension Fund Act of 1917, as amended July 2, 1925, makes it the duty of your Honorable Body

“To require every fireman retired on account of disability to be examined at least once a year by a physician to be selected by the board and to require said physician to report to the board the physical and mental condition of all such firemen examined by him.”

Section 5 (f) gives to your Honorable Body the power “to employ a physician.”

I am of the opinion that your Honorable Body has the power and that it is your duty to employ a physician to re-examine all disability pensioners who have not been examined during 1926, and to require every fireman retired on account of disability to report to such physician for examination.

Yours respectfully,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved :

FRANCIS X. BUSCH,
Corporation Counsel.

Legality of Contract of Board of Local Improvements for Wrecking Buildings.

October 9, 1926.

HON. JOHN J. SLOAN, President, Board of Local Improvements.

Dear Sir:

We are in receipt of your communication under date of September 22, 1926, and have noted your request for an opinion as to the legality of a proposed contract made in pursuance of bids secured under a proposed advertisement, a copy of which was attached to your letter.

A contract for a local improvement must meet the requirements of Sections 74, 75, 76 and 77 of the Act for Local Improvement (Cahill, Revised Statutes, 1925, Ch. 24, Sections 202-205). These several sections provide in substance, that all contracts for the making of any public improvement, when the expense thereof shall exceed \$500, shall be let to the lowest responsible bidder, in the following manner: Within ninety days after the term of court at which the judgment of confirmation has been made, if there be no appeal, steps shall be taken to let the contract for the work as follows: First, an order to advertise for bids shall be entered by the Board of Local Improvements in its records; second, a public notice shall be published that bids will be received; third, there shall be an examination and public declaration of the bids; fourth, the awarding of the contract shall be made within twenty days after the time fixed for receiving the bids, and if no award be made within that time another advertisement for bids shall be made as in the first instance.

Section 75 of the Act concerning Local Improvements, which specifies the time within which a contract shall be let, is mandatory.

Section 76 of the act, which prescribes the notice for the letting of the contract, uses the term improvement in the singular. This section provides, "That bids will be received for the construction of such improvement, either as a whole or in such sections as the board shall specify in its notice, * * *" and that "bids may be made either for such work as a whole or for such specified sections thereof."

A consideration of the foregoing sections of the act compels one to conclude the Legislature intended the Board to contract with reference to each improvement as a separate entity. The Board may enter into one contract, or a series of contracts, for the construction of each improvement. Steps for the letting of each contract shall be taken within ninety days after the term of court at which the judgment of confirmation as to any parcel affected by the improvement was entered, if there be no appeal from such judgment.

What is an improvement under the general plan of the City of Chicago for the widening of its more heavily burdened traffic arteries? Does the improvement include all the streets which will be widened in the course of the next few years? Or does the improvement include all the sections of a particular street which will be widened eventually? Or does the improvement include only those particular streets, or sections of particular streets which are named in a separate ordinance passed and approved by the City Council on a given date? In the absence of any judicial interpretation of the term improvement as used in the act with reference to a city-wide plan of improvement, we are of the opinion the passage of each ordinance constitutes a separate improvement. The ordinance which provides for the widening and improvement of North Western avenue between Fullerton and Belmont avenues is an improvement; the ordinance which provides for the widening and improvement of North Western avenue between Belmont and Lawrence avenues is another improvement.

We are of the opinion the Board of Local Improvements cannot include the wrecking work on two or more improve-

ments in one contract. The Board may let one contract for the wrecking of all the buildings or for a number of buildings in each improvement, provided the requirements as to the time specified in Section 75 of the act are met.

Very truly yours,

EDWARD M. QUINN,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Pension Rights of Minor Child of Deceased Fireman When the Mother of Such Child Remarries.

October 9, 1926.

THE BOARD OF TRUSTEES OF THE FIREMEN'S PENSION FUND.

Gentlemen:

Complying with your request for an opinion as to the pension rights of a minor child of a deceased fireman when the mother of such child remarries, the following is submitted:

You have forwarded a letter signed by Mrs. Carl M. Rohr which states in substance that she and a minor child were receiving a pension following the death of her husband, Raymond J. Prince, who died March 19, 1911; that in September, 1920, she married Carl M. Rohr; following her marriage that both pensions were stopped; and that she desires to know whether or not her minor son is entitled to a continuation of his pension.

Section 10 of the Firemen's Pension Fund Act of 1917 provided in Paragraph (b) thereof for the payment of a certain pension to the guardian of any child or children of a deceased fireman "while their mother is living and unmarried."

On July 2, 1925, there were some changes made in the Firemen's Pension Fund Law, and among those changes was

the amending of Paragraph (b) of Section 10 by omitting the words "and unmarried."

The Legislature in 1925 granted a right to a pension which had not theretofore existed, namely, the right of a minor child to be paid a pension provided for in the act without regard to whether the mother of such child remarried. Prior to July 2, 1925, a minor child was entitled to be paid a pension only while its mother remained unmarried. This legislative enactment was one which affected a legal right and not merely a legal remedy, and while minor children of deceased firemen are now entitled to a pension without regard to the remarriage of the mother, such was not the case prior to July 2, 1925; and as the amendment to Section 10, which removed the condition or limitation of the child's pension was not made retroactive, a minor is not entitled to demand pension payments withheld prior to July 2, 1925, because of the remarriage of the mother of such minor.

As the law stands now, following its amendment in 1925, the guardian of any child or children of a deceased fireman is entitled to be paid the pension provided for in the act even though the mother has remarried.

I am of the opinion that a minor child of a deceased fireman is not entitled to be paid the pension provided for in the Firemen's Pension Fund Act for any period of time between the remarriage of the mother of such minor and the date of the amendment of the Firemen's Pension Fund Act, to wit, July 2, 1925. I am of the further opinion that the minor child of a deceased fireman is entitled to be paid the pension provided for in the act beginning July 2, 1925, without regard to whether or not the mother of such minor has remarried.

Yours respectfully,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Calling of Special Assessment Bonds for Payment Before Maturity.

October 11, 1926.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

In your letter of recent date concerning the payment of special assessment bonds before maturity, you ask us whether there is some legal manner in which you can force the holders of bonds to bring in such bonds for cancellation or for partial payment before the time fixed for the next call under the statute.

The specific case you mention is that of the State Bank of Chicago, which you say is the holder of several million dollars' worth of special assessment paper in the shape of bonds and vouchers which fall due at the end of the fiscal years 1926, 27, 28, 29 and 30. You say collections already made on this paper amount to upwards of one million dollars, and that these collections are available for the payment in full of some of the bonds and vouchers and of partial payments on the remainder. You call attention to the fact that said payment would result in a great saving of interest, and would otherwise help the special assessment fund very materially. At the same time, you say that you are aware that there is an official call at the beginning of each year for payment on February 10th, after which the interest automatically ceases.

This is not a new question. It has received attention from this department from time to time over a period of more than twenty years. It is undoubtedly true that if funds on hand and available for the payment of these vouchers and bonds could be used at once it would result in a saving of interest, the wiping out in many cases of a deficiency in interest, and in other cases in an increase of the rebate fund. However, the only way that we see that this can be done is by an

amendment of the Local Improvement Act permitting additional calls to be made during the year.

By Section 43 of the Local Improvement Act it is provided that on or before January 10th of each year the treasurer, or some other officer designated by ordinance, shall ascertain the amount available for the payment of bonds of each unmatured series, and shall select by lot bonds of each of said series to be paid. Thereupon, notice is given by publication, of the particular bonds selected to be paid, and the date of payment is fixed at February 10th, after which interest ceases. There has been no change in this provision of the law since the act was passed in 1897.

On March 21, 1902, this department in an opinion written by Edgar B. Tolman, Esquire, who was then attorney for the Board of Local Improvements and approved by Hon. Charles M. Walker, Corporation Counsel (see printed Opinions of the Corporation Counsel and Assistants from 1897 to 1905, page 311) answered a number of specific questions of the Comptroller. One of the questions and the answer thereto was as follows:

“Can a call of such bonds be made after January 10th of the year, either with or without consent of the holders of all the bonds?”

In answer to this question I beg leave to say that I am of the opinion that a call of such bonds cannot be made after January 10th of any year, if the holders of the bonds so called object. Other bondholders cannot object, because the payment of bonds out of the moneys which ought to be devoted to the payment of those bonds, works them no injury. If after the bonds are called the holder consents to the call, it will be valid; if he objects, it will be invalid.”

As stated above, this matter has been discussed a number of times since then, but the question has always been answered in the same way. There is no way of compelling the holder of the bonds to surrender them for payment after the annual call. A call can be made and if he surrenders them voluntarily they can be taken up. This will necessarily be

the case unless the law is changed as we have suggested above.

Yours truly,

LEON HORNSTEIN,

First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Power to Prohibit Heavy Trucks on Streets in Residential Districts.

October 13, 1926.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

We have noted your request, made in behalf of the Central Bryn Mawr Improvement Association, for an opinion in reference to trucks using residential streets for heavy teaming purposes.

The General Act for Incorporation of Cities and Villages confers upon the City Council the power "to regulate the use of" streets. (Cahill Revised Statutes 1925, Ch. 24, Sec. 65, Sub. Sec. 7.) Sub Sec. 20, Sec. 65 of this act grants unto the City Council power "to regulate traffic * * * upon the streets * * *."

In 1889 the Legislature passed an act relating to pleasure driveways. Section 1 of this statute provides "that the City Council in cities * * * shall have the power to designate by ordinance the whole or any part of *not to exceed two streets* * * * to be used for *pleasure driving only* * * *." Section 3 of this statute provides "said corporate authorities may * * * prescribe the kind of vehicles that shall be allowed upon the same * * * and may exclude

*therefrom * * * traffic teams and vehicles, so as to free the same from any and all business traffic or objectionable travel * * *.*" Cahill Revised Statutes 1925, Ch. 24, Secs. 1053-1056).

The State Supreme Court sustained the Act of 1889 (*Cicero Lumber Co. v. Town of Cicero*, 176 Ill., p. 9). In upholding the act the court expressed the opinion there was *nothing unreasonable* in excluding traffic teams from a street designated as a pleasure driveway, as such a driveway must be constructed in a particular manner and heavy teaming thereon would result in injury to the street.

In 1903, 1907, 1911 and subsequent years, the Legislature enacted statutes and amendments thereto which may be termed Motor Vehicle Statutes. These statutes deal with such questions as the registration by owners of motor vehicles; the equipment of the vehicle with lamps, horns and the like; the registration by manufacturers; speed; licenses and badges of chauffeurs; certain laws of the road and the like.

In *Ayers v. City of Chicago*, 239 Ill. 237, the court, speaking through Judge Vickers, in reference to the object of the Motor Vehicle Act of 1907, stated: "The purpose of the legislature was to pass a new and complete law designed to take the place of all municipal ordinances or rules regulating the equipment and operation of motor vehicles." The same judge, in *People v. Sargent*, 254 Ill. 514, where the constitutionality of the Motor Vehicle Law of 1911 was before the court, said: "A careful reading of the Act of 1911 will show that the legislative intent is the same as expressed above in respect to the Act of 1907. The manifest purpose of the legislature was to bring the whole subject of regulating the use of motor vehicles under the control of the State."

The foregoing quoted statement as to the purpose of the Acts of 1907 and 1911 must be qualified when applied to the Act of 1919 which is now in force. Section 13 of the Motor Vehicle Statute of 1907 (Hurd, Revised Statutes 1908, p. 1880, Ch. 121, Sec. 269M); Section 12 of the Motor Vehicle Statute of 1911 (Hurd, Revised Statutes, 1912, p. 2045, Ch.

121, Sec. 269 L); and Section 26 of the present Motor Vehicle Statute (Cahill, Revised Statutes 1925, Ch. 95 A, Sec. 26) cover the same general subject matter. These sections provide, in substance, that no owner of a motor vehicle who has paid the registration fees and obtained a license from the Secretary of State shall be required to pay any tax upon the use of such motor vehicle in excess of a certain sum, the amount being graded in the Acts of 1911 and 1919 to correspond with the horse power; and that such owner shall not be required to comply with other provisions or conditions as to the use of his motor vehicle except as provided in the act. The proviso with which we are primarily concerned, as taken from Section 12 of the Act of 1911, reads:

“Except as in this section provided, no city, town or village, or other municipality shall have power to make any ordinance, by-laws or resolution limiting or restricting the *use or* speed of motor vehicles or motor bicycles, and no ordinance, by-law or resolution heretofore or hereafter made by any city, village or town, or other municipal corporation within the State, by whatever name known or designated in respect to or limiting the *use or* speed of motor vehicles or motor bicycles shall have any force, effect or validity, and they are hereby declared to be of no validity or effect: *Provided*, that nothing in this act contained shall be construed as affecting the power of municipal corporations to make and enforce ordinances, rules and regulations affecting motor trucks and motor driven commercial vehicles and motor vehicles which are used within their limits for public hire, or from making and enforcing reasonable traffic and other regulations except as to rates of speed not inconsistent with the provisions hereof.”

The above quoted language constitutes the concluding part of Section 26, Act of 1919, except that the underscored words—“*use or * * * use or*”—were omitted in the present statute by the Legislature. The Motor Vehicle Statutes of 1907 and of 1911 (Sections 13 and 12, respectively) expressly provide no owner shall be “excluded or prohibited from or limited in the free use of his said

motor vehicle or motor bicycle'' upon any public street. This clause was omitted by the Legislature in the Statute of 1919.

It is clear the Legislature, by the Motor Vehicle Law of 1919, did not intend to confer upon the owner of a motor vehicle, who has secured a license from the Secretary of State and from the city of which the owner is a resident, the free and unrestricted use of public streets. The object of the law was to exempt the owner from the payment of any other license fee or tax upon his motor vehicle. The statute expressly exempts the owner of a motor vehicle from municipal regulations as to the minimum rates of speed at which he may travel. The owner of a motor vehicle, by the terms of the statutes, is subject to such "reasonable traffic and other regulations" as a municipality may see fit to enact.

The foregoing interpretation finds judicial support in the case of *City of Chicago v. Shaw Livery Co.*, 258 Ill. 408. The court in commenting upon the clause "or from making and enforcing reasonable traffic and other regulations except as to rates of speed not inconsistent with the provisions hereof," states: "By the addition of the language last quoted * * * the Legislature has invested municipalities with the power and authority to make any regulations of the use of motor vehicles not inconsistent with the provisions of the Act, except as to rates of speed."

The Motor Vehicle Law of 1919 does not take away from a city, either expressly or by implication, the power to regulate the use of its streets either as to automobiles or horse-drawn vehicles, as conferred upon it by Sec. 65, Sub-sec. 7 of the General Act for the Incorporation of Cities and Villages.

The power to regulate gives authority to impose reasonable restrictions and restraints. (McQuillin, *Municipal Corporations*, Vol. 8, p. 6634.) Just how far this power goes with respect to segregating streets and prohibiting heavy traffic is problematical. In one case, frequently cited, of a park board which was authorized by statute to lay out roadways and "to regulate the use thereof," the court stated that it

was "unwilling to concede the statute * * * is not broad enough to permit of prohibiting the use of the avenue by heavy business vehicular traffic." (*Barnes v. Essex County Park Commission*, 91 Atlantic 1019.)

The Illinois court, in construing the statute concerning pleasure driveways which is mentioned above, stated that the statute "leaves *all* the other streets and roads in the municipality to be used for general travel and for traffic teams." (*Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9.) The statute in question, permitting only two streets in a municipality to be set aside for pleasure driveways, manifestly was intended primarily to invest the smaller cities and villages with power to provide a means of rapid pleasure driving in all directions, but it means little to the City of Chicago. In this City, since the statute was not adequate, the practice has been to follow along the line of least resistance and to turn over streets to the park boards for use and improvement as pleasure driveways, under powers which these boards possessed in a more adequate degree.

In our opinion, under the existing law, the City Council cannot entirely exclude heavy vehicular traffic from residential streets unless they are so set apart as pleasure driveways. If it is deemed advisable to depart from the practice heretofore followed, the City Council may enact reasonable regulations restricting heavy vehicular traffic in its use of certain residential streets to specified hours of the day. Such restrictions constitute a limitation upon the use of the street by heavy trucks, but do not amount to a prohibition of the use of the street by heavy trucks.

Whether an ordinance which regulates the use of a particular residential street or system of residential streets by heavy trucks would be sustained by the courts, would depend upon its reasonableness. Whether the ordinance was reasonable would depend upon *facts* pertaining to each ordinance, to wit: the hours of limitation; the traffic; the character of the neighborhood—frequency of stores, and so on; nature (construction) of pavement. (Hence, in the model ordinance

which is set out below no attempt has been made to set forth the hours.)

The following draft of a tentative ordinance is submitted:

“Omnibuses, express wagons, wagons, carts, drays, trucks, or other vehicles for carrying or ordinarily used to carry merchandise, goods, tools, wares, produce, products, rubbish or other articles, however propelled, except such as are engaged in repairing or constructing *Avenue A*, shall not use *Avenue A* between the hours of . . . and . . . : *Provided, however*, that wagons, trucks or other vehicles carrying goods, merchandise, or other supplies to or from any house or premises abutting upon such avenue shall be permitted to enter thereon at the cross-street nearest said house or premises in the direction in which the same are moving and deliver or receive such goods, merchandise or other supplies, but shall not proceed thereon further than the nearest cross-street thereafter. Any person violating any clause, section or provision of this ordinance shall be fined in a sum not exceeding \$100 for each offense.”

The City Council, at various times, has passed and approved ordinances which prohibited vehicles of more than a given capacity from the use of specified streets or certain sections of specified streets. Thus, on October 22, 1924, an ordinance was passed which contained a prohibition against the use, by vehicles of more than five ton capacity of North Sacramento avenue from Montrose avenue to Lawrence avenue; and of North Richmond street from Montrose avenue to Wilson avenue. It is doubtful whether such ordinances would be sustained if their validity were attacked in court.

The complete exclusion of heavy business traffic from the use of residential streets is a matter within the discretion of the State Legislature. The power of the Legislature over public streets, so far as the public interest is concerned, is very sweeping, and it may change their control, giving jurisdiction over them to the City or to such other authority as it may see fit. So long as private rights are not invaded, the legislative authority may vacate streets, may limit their use, and

may permit their use for any purpose not incompatible with the object for which they were established (*McCormick v. South Park Comrs.*, 150 Ill. 516; *Barrows v. City of Sycamore*, 150 Ill. 588; *West Chicago Park Comrs. v. McMullen*, 134 Ill. 170).

Very truly yours,

EDWARD M. QUINN,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

Lease of Portion of Municipal Pier Without Council Authority.

October 14, 1926.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We have received your letter of the 13th instant, to which you attached copy of a letter from Harry T. Branstetter with reference to securing a lease for a portion of the Municipal Pier. The application is for space to be used for advertising purposes for a period of thirty days, with the privilege of extending the lease for a period of not less than one month nor more than five months upon giving notice. The question you ask is whether it will be legal to grant permission to the applicant to enter upon the premises in anticipation of favorable action by the City Council in the granting and execution of a formal lease for the premises.

There does not appear to be any statute or ordinance under which you would have authority to grant such permission. All leases for space on the Municipal Pier are executed

by virtue of the powers granted under the Harbor Act of 1913 (see Cahill's Revised Statutes, 1925, page 530). Section 3 of this act gives the City the power to lease portions for a period of not longer than twenty years on terms and conditions to be prescribed by ordinance. Under Section 11 a lease for a period of more than five years cannot be entered upon within ninety days after the passage of an ordinance, and is subject to a referendum if petitioned for. It is our opinion that, by virtue of these precise specifications in the statute, the renting of space on the Municipal Pier must be regarded as a formal matter on which appropriate action of the City Council is necessary.

Yours truly,

LEON HORNSTEIN,

First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Additional Opinion on Contract for Wrecking Buildings.

October 14, 1926.

HON. JOHN J. SLOAN, President, Board of Local Improvements.

Dear Sir:

Since rendering you an opinion under date of October 9, 1926, in reference to the letting of a contract for the wrecking work on certain street widening projects, additional facts relating to your policy have been called to our attention by your office.

It appears the Board of Local Improvements has been proceeding on the theory that the wrecking work involved in a local improvement for the widening and improvement of a street does not constitute a part of the improvement; that the costs pertaining to the wrecking work are paid from the general corporate fund, rather than from the moneys arising from the special assessment proceedings.

This department, without approving the legal soundness of your theory, desires to call your attention to Section 50 of Article 9 of the Cities and Villages Act (Ch. 24, Sec. 121, Cahill's Statutes, 1925). This article provides: "Any work or other public improvement, when the expense thereof shall exceed \$500.00 shall be let to the lowest responsible bidder. * * * Any such contract may be entered into by the proper officers without advertising for bids * * * by a vote of two-thirds of all the aldermen * * * elected."

It has been held the above section applies to *all* contracts for public improvements where the expense exceeds \$500 and not merely to contracts for such improvements as are to be paid for by special assessment. The language is "clear and specific." (*City of Chicago v. Hanreddy*, 211 Ill. 24.)

It is evident the Board of Local Improvements can avoid advertising for bids on each wrecking job, the cost of which exceeds \$500, only by having the City Council by a two-thirds vote authorize the letting of the particular wrecking contract, or possibly, by having the City Council by a two-thirds vote ratify such a contract after its execution.

Your plan contemplates the letting of a contract for a year for all kinds of wrecking, based on unit prices per cubic foot of each kind of wrecking work. This plan is only partially feasible. No actual contract without an antecedent appropriation therefor would be lawful. But bids could be received for work of this kind to extend all year round. Then, as occasion arises from time to time to wreck a building or a number of them, the City Council could each time pass an order authorizing you to let the work to the party with whom

you have the understanding, as being the lowest bidder thereon.

Very truly yours,

EDWARD M. QUINN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Status of Provisional Captains.

October 15, 1926.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

In your letter of September 29th you state that five lieutenants were appropriated for as "provisional captains" to take the place of captains of police on furlough or absent for other reasons, such provisional captains to perform the duties of lieutenant when they are not engaged in the captain's duties. You further point out that by the amendment of the code and repeal of the ordinance creating the positions you were left with authority to appoint provisional captains without there being such a position. You ask what you should do with respect to the appointment of such five additional captains at a lesser salary than is provided for regular captains by the appropriation ordinance.

In case the ordinance creating the position of provisional captains had not been repealed, that ordinance together with the provision in the other ordinance authorizing you to employ five men for such positions would have been regarded in law as so connected that they would have to be construed

together. That is to say, they would have to be regarded in *pari materia*. Inasmuch as the ordinance creating provisional captains has been wiped out, however, and the status is restored to what it was before, we are of the opinion that you could properly ignore the word "provisional" in the ordinance authorizing the employment of these five lieutenants as captains.

This would still leave a somewhat anomalous condition, since you would have five captains for whom the City Council contemplated a lesser salary than for regular captains. There is only one way in which this can be adjusted. That is by the passage of a new ordinance which fixes the salary of such captains for the balance of the current fiscal year. In addition to this, it would be necessary to exact waivers of all except the amount allowed by the City Council from such five lieutenants who are promoted.

If this is done in this way you would then be in the position of having appointed five additional captains whose rank would remain such after the present fiscal year and who would have to be appropriated for in the next annual appropriation ordinance. Since this is the very plain intention of the City Council, we recommend that you follow the procedure we outline herein and we enclose herewith an ordinance for presentation to the next meeting of the City Council which will take care of the situation.

Very truly yours,

LEON HORNSTEIN,

First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Permit for Dry Cleaning Establishment.

October 15, 1926.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

This will acknowledge the receipt of your letter of October 7th transmitting a communication from Max Krause, Esq., attorney for the Cooperative Cleaning and Dyeing Company, relative to the right of the latter company to a building permit to rebuild its dry cleaning establishment at 1842-1848 West 21st street.

From information presented it appears that this dry cleaning establishment was erected before the adoption of the Fire Prevention Ordinance of 1912 regulating the construction and equipment of dry cleaning establishments; that upon its premises are two-story and other frame structures; that the plans for the rebuilding of the plant have been approved by the Fire Prevention Bureau as complying with the new dry cleaning ordinance adopted May 26, 1926, including the new 25 feet clearance provision.

The Zoning Ordinance, however, placed the plot of ground upon which this dry cleaning establishment is located in an apartment district. The dry cleaning establishment is, therefore, a non-conforming use, and it may under the Zoning Ordinance be continued but not extended. It may also be reconstructed or structurally altered but to an extent not exceeding 50 per cent of the value of the building in any ten-year period. (Section 14 of Zoning Ordinance.)

It is contended by the attorney for the dry cleaning establishment that the plant may be rebuilt by reason of a certain new provision in the Dry Cleaning Ordinance of May 26, 1926, which was not contained in the former Dry Cleaning Ordinance, and which reads, "and further provided that

such buildings (referring to buildings in which a dry cleaning business was carried on prior to July 22, 1912) shall be permitted to be altered or rebuilt if all the regular building requirements are complied with," etc.

The letter of the attorney for the dry cleaning establishment, which you transmit, reads in part as follows:

"If you will refer to the City Council proceedings of May 26th, 1926, as entered in the Journal, you will note that the City Council enacted an ordinance relating to the business of dry cleaning and the character of buildings in which such business is carried on. This ordinance supersedes the zoning ordinance in so far as it relates to the use of the cleaning and dyeing business and the building in which such use is maintained, and that ordinance specifically permits alterations and rebuilding of buildings wherein the business of cleaning and dyeing has been carried on prior to the year 1912. You will perceive from this that the ordinance to which I refer is in direct conflict with the zoning ordinance on this point. Moreover, the zoning ordinance is one of those to be classified as a general ordinance, whereas the last ordinance on the subject is a specific and definite ordinance. Therefore, it is clear that the City Council intended the latest ordinance to supersede the first ordinance on the subject."

The ordinance of May 26, 1926, relating to the building and equipment of dry cleaning plants is essentially a fire prevention measure. In the enactment of its provisions the City Council recognized that the dry cleaning business is one of the most hazardous with which the City authorities have to deal—the most hazardous in fact of any business in which inflammable liquids are used; that a fire occurs practically every day in some one of the dry cleaning plants in Chicago; that it is a business which is particularly fraught with danger to adjoining property and to life from the point of view of explosion and fire hazard. (Brief of City, *Klever Shampay Karpel Kleaners v. City.*) Hence the City Council enacted the 25 feet clearance and other requirements of the dry cleaning ordinance referred to in order to safeguard life and property from the danger of fire or explosion.

Also the City Council in adopting this ordinance had in view the fact that there are in the City of Chicago some dry cleaning plants, erected before the enactment of the fire prevention ordinance of July 22, 1912, which because of their antiquated construction, surroundings or methods may be very dangerous at the present time from the standpoint of explosion or fire. It recognized that situations might arise because of changes in processes, new methods of operation, new buildings or otherwise, in which it would make for better fire prevention and reduce the fire hazard to permit dry cleaning establishments in existence before July 22, 1912, to be altered or rebuilt, provided they complied with the present building requirements and with the provisions of the new dry cleaning ordinance applicable thereto. To take care of these cases there was inserted in the dry cleaning ordinance of May 26, 1926, the new provision that "such buildings may be permitted to be altered or rebuilt if all the regular building requirements are complied with."

We have heretofore advised the Fire Commissioner to the above effect (Opinion No. 1257), but we have never determined that the Dry Cleaning Ordinance of May 26, 1926, does or could abrogate in any way the provisions of the Zoning Ordinance.

We doubt very much that this dry cleaning ordinance, or any other similar ordinance relating to a particular type of business, could repeal by implication or operate to engraft exceptions upon the prior general Zoning Ordinance.

Moreover, we deem it advisable and the proper policy to pursue that applicants for permits in such cases, which do not fall within the strict letter of the Zoning Ordinance, if they feel aggrieved, file appeals for variations with the Board of Appeals.

That body, under an appropriate state of facts, may grant relief without going outside of the Zoning Law at all and without even the necessity of consideration by this department in any particular instance of the legal question of the withdrawal from the provisions of the Zoning Ordinance

by interpretation or construction of any cases now included within its terms.

In the case of *Cann v. City* (241 Ill. App. 21) the Appellate Court said:

“It is manifest that the statute recognizes that from the very subject of the enabling act and any ordinance that may be passed under it, ‘practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the ordinance’ will naturally be encountered and require such latitude of decision as will be in harmony with the ‘spirit of the ordinance’ and at the same time promote ‘substantial justice.’ ”

The Board of Appeals, if it saw fit, could impose requirements as a condition in permitting the rebuilding of the dry cleaning plant in question that would safeguard the surrounding property, observe the spirit of the ordinance and comport with public safety and welfare. (234 N. Y. 484.)

It is, therefore, respectfully suggested that you refuse the permit requested at this time and advise the applicant therefor, if he feels aggrieved by your decision, to file an appeal with the Board of Appeals.

Very truly yours,

WILLIAM L. SULLIVAN,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Permit for Gasoline Filling Station.

October 15, 1926.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

This will acknowledge receipt of your letter of October 7th requesting the views of this department.

On April 8, 1926, it appears, application was made to you for permit to install tanks for a gasoline filling station to be located at 1401-1409 West Garfield boulevard; that frontage consents were filed as required by ordinance, which consents after being verified by the Bureau of Maps showed a surplus of 9.07 feet; that a permit to install the tanks was issued by your department to the applicant upon payment of the required fees.

October 6, 1926, Alderman Moran presented to your department a protest against the proposed filling station, which protest contains a great many names and is in the following language:

“PETITION TO
THE FIRE COMMISSIONER
CITY OF CHICAGO.

“We, the Undersigned, Holders of property adjacent to and abutting the Southwest Corner of Garfield & Loomis Blvds., Chicago, Illinois, hereby enter our protest against the erection of a Gasoline & Oil Station at the aforesaid corner, knowing that the same is detrimental to our health and property.”

The statement is made by Alderman Moran in his letter to you that some of the parties who are supposed to have signed the petition consenting to the installation of the tanks have also signed the petition objecting to their installation.

You wish to be advised whether or not the permit issued should be revoked on the evidence submitted.

In our opinion, so far as we are informed, you would not be justified in revoking this permit. The premises in question are placed by the Zoning Ordinance in a commercial district, and a gasoline filling station is allowed therein.

Frontage consents may be revoked before acted upon but not afterward. *Littell, et al. v. Board of Supervisors*, 198 Ill. 205; *Theurer v. The People*, 211 Ill. 296.

There is no suggestion of fraud of any kind in the obtaining of the frontage consents, the protest of the adjacent

property owners being merely to the effect that the gasoline filling station in question will be detrimental to their health and prosperity.

Questions similar to the above have been considered by this department on several occasions, and we therefore refrain from an exhaustive discussion here. (Opinions of the Corporation Counsel and Assistants, April 14, 1924, p. 861, by James J. Coughlin; July 17, 1913, p. 369, by Max Korshak; December 7, 1914, p. 198, by Leon Hornstein; February 24, 1915, p. 339, by Bryan Y. Craig.)

You are therefore advised that, in our opinion, the permit should be regarded as valid and effective for all purposes of its issuance.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Closing Ends of Private Streets.

October 18, 1926.

HON. DONALD S. MCKINLAY, Alderman of the 19th Ward.

Dear Sir:

We have your communication of October 13, 1926, stating that just south of 99th street, in your ward, running from Wood street to Prospect avenue, is a private street known as Beverly Glen Parkway; that this street was made private, because the size of the piece of ground subdivided did not permit a 66 foot street, and that our examiner of subdivisions refused to accept a 40 foot street.

You also state that a goodly number of homes are now located on this narrow private thoroughfare, and that due to

the paving of 99th street, a number of trucks and vehicles are commencing to use the street in question. Also, that the owners desire to blockade one end of this, their street, and, that you have told them that you are sure they had a right to do so. However, you desire our opinion as to their rights in this matter.

From examination of a plat which purports to show this private subdivision along this Beverly Glen Parkway from Wood street to Prospect avenue, we find that it is in the nature of a private community subdivision that has no public street or thoroughfare. In fact, we are informed by our Superintendent of the Map Department that a plat similar or identical with the one now being used in this community subdivision was submitted to our Map Department for approval. Our Map Department refused to accept this proffered subdivision because the street in question had been platted 21 feet 7 $\frac{3}{4}$ inches wide. Under our ordinances our Superintendent of Plats was not permitted to plat this subdivision. It would seem, however, that parts of this subdivision have been sold by metes and bounds and a private or community street has been reserved. It would also seem that the water pipes and water meters as well as the pavement in this street are all privately owned. The City could not possibly have any prescriptive rights in this supposed private street, because it has not been put in use for more than three years.

We are, therefore, of the opinion that you have advised your constituents correctly and that the owners of pieces of property along this private street have the right not only to close one end, but can close both ends, if they so desire, in order to keep out the public traffic.

Yours truly,

FRANK T. HUENING,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Location of Garage Near Building Formerly a Church.

October 20, 1926.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

This will acknowledge receipt of your letters of October 1st and October 13th relative to the application of A. W. Dobbert, 2213-17 North Halsted street, for a permit for a public garage.

This public garage, it appears, would be located within 200 feet of what is known as the Belden Avenue Baptist Church Annex, located at 2219-2223 North Halsted street. This annex was formerly a Methodist Episcopal Church but was purchased by the Belden Avenue Baptist Church and is used by the latter as what is called an annex. The regular church services for the congregation are held at the Belden Avenue Baptist Church, Belden avenue and Halsted street.

In the Belden Avenue Baptist Church Annex, it appears, Sunday school is conducted each Sunday at 9:45 a. m. Bible school classes, one or more, are held each week night except Wednesday and Sunday, each class containing 12 to 50 pupils. Orchestra rehearsal is held one night a week.

Other purposes, you state, for which the Belden Avenue Baptist Church Annex is used are as follows:

Monday—8 P. M. The World Wide Guild, first Monday of each month.

Monday—8 P. M. The Board of Deacons. The Monday before the first Sunday of each month.

Monday—8 P. M. The Board of Trustees. The Monday after the second Sunday of each month.

Thursday—2 P. M. The Good Will Circle. Third Thursday of each month.

Friday—8 P. M. The Choir.

Saturday—1:30 P. M. Junior Choir.

Saturday—2:30 P. M. C. W. C. First and third Saturdays.

The ordinances prohibit the location of a public garage within 200 feet of any building used "as and for a church * * * or the grounds thereof," and the question arises whether the Belden Avenue Baptist Church Annex which is within 200 feet of the proposed garage is used as and for a church within the meaning of the ordinance.

The word "church" has been the subject of many judicial interpretations more or less conflicting.

Bouvier's Law Dictionary defined "church" to be:

"A place where persons regularly assemble for worship."

Manifestly the purpose of the above ordinance was to protect the comfort and safety of the public while in a building in attendance at public worship. Public worship in this case would be the assembling together of the congregation of the Belden Avenue Baptist Church, together with others who may choose to come, for the purpose of worshipping God in accordance with the rules and regulations and religious forms of the Baptist Church. This takes place, as we understand it, in the Belden Avenue Church, but does not take place in the Belden Avenue Baptist Church Annex.

What does take place in the annex, it appears, are exercises, classes and meetings of "sub-organizations" of the church or of the congregation, and while it is true that they are conducted for the highest and most commendable uses and purposes, yet it cannot be assumed that the exercises, classes and meetings of such sub-organizations constitute the building as one "used as and for a church" within the meaning of the above ordinance.

Ordinances in derogation of common law or of the free use of property must be strictly construed, and if there be an ambiguity as to whether the ordinance applies, it must operate against the restriction and in favor of the free use of property.

While we understand that the Belden Avenue Baptist Church Annex is built in the usual form of a church struc-

ture, yet the use of the building rather than its architecture is what controls, as the prohibition contained in the ordinance reads any building "used as and for a church."

After careful consideration of the matter, we are of the opinion, in so far as we are advised, that the Belden Avenue Baptist Church Annex is not a building which is used "as and for a church" at the present time within the meaning of the provisions of the above ordinance.

Yours truly,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Waiver of Liquidated Damage Clause on Contracts.

October 22, 1926.

LOUIS E. GOSSELIN, Esq., Auditor, Department of Finance.

Dear Sir:

Your communication addressed to the Corporation Counsel, requesting an opinion as to the authority of the Commissioner of Gas and Electricity to waive the liquidated damage clause in a certain contract Number 8262, dated June 10, 1926, between City of Chicago and Hansell-Elcock Company, has been referred to the undersigned for consideration and reply.

Article 16 of the above mentioned contract is as follows:

"The Contractor under this contract agrees to begin the work under this contract within ten (10) days from the date of the approval, by the City of Chicago, of the bond of said Contractor and to complete all the work

specified in this contract by the 1st day of September, 1926.

It is understood and agreed that time is of the essence of this contract, and that a failure on the part of the Contractor to complete the work herein specified within the time specified will result in great loss and damage to said City of Chicago, and that on account of the peculiar nature of such loss or damage it is difficult, if not impossible, to accurately ascertain and definitely determine the amount thereof."

Article 17 is as follows:

"It is, therefore, covenanted and agreed that in case the said Contractor shall fail or neglect to complete the work herein specified on or before the date hereinbefore fixed for completion, the said Contractor shall and will pay the said City of Chicago the sum of twenty-five (\$25.00) dollars for each and every day the Contractor shall be in default in the time of completion of this contract.

Said sum of twenty-five (\$25.00) dollars per day is hereby agreed upon, fixed and determined by the parties hereto as the liquidated damages which said City of Chicago will suffer by reason of such default, and not by way of a penalty. In case the said Contractor does not complete the work covered by this contract on or before the time specified herein for the completion of the said work, the Commissioner of Gas and Electricity shall decide the number of days the said Contractor is in default, and the decision of said Commissioner shall be final and binding upon both parties hereto.

It is further agreed that if said City of Chicago shall accept any work or make any payment under this contract after any such default, such acceptance, payment or payments shall not in any respect constitute a waiver or modification of any of the provisions herein, and particularly the provisions in regard to time and liquidated damages for delays."

In your letter you state:

"The Commissioner of Gas and Electricity, under date of October 13th, has written us in part as follows:

"The Contractor was delayed 22 days in completing the delivery of these steps due to the fact that the mal-

leable iron foundry with whom the contractor had placed the order met with certain difficulties in the manufacture of these steps. Inasmuch as the City was in no way damaged by reason of the failure of the contractor to furnish these steps in the time specified in the contract, I would recommend that this contract be extended the necessary 22 days and the liquidated damage clause eliminated."

The foregoing contract and the bond for its faithful performance are instruments executed under seal, and the law is well settled that an executory contract or instrument under seal can not be altered or modified by parol (*Alschuler v. Schiff*, 164 Ill. 298).

The request for an extension of time within which to execute the contract does not appear to fall within the provisions of Article 18 thereof which provides for the granting of such extension "In the event that any material alterations or additions are made as herein specified, which in the opinion of the Commissioner of Gas and Electricity will require additional time for the execution of any work under this contract, * * *."

I am of the opinion that the terms and provisions of the contract in question can be modified or amended only by the execution of a new contract under seal, making such new provisions as may be agreed upon by and between the parties thereto, and the execution of a new bond in conformity therewith.

Respectfully submitted,

ROY S. GASKILL,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Waiver of Damage Clause in Contract.

October 22, 1926.

LOUIS E. GOSSELIN, Esq., Auditor, Department of Finance.

Dear Sir:

Your communication addressed to the Corporation Counsel with reference to contract No. 8264 between the City of Chicago and Hansell-Elcock Company, dated June 4, 1926, has been referred to the undersigned for consideration and reply.

In your letter you state:

“We are in receipt of a letter from the Commissioner of Gas and Electricity, dated September 30th, which reads in part as follows:

‘You will note that the tallies are dated August 11th, whereas the completion date according to the contract should have been July 30th. On the shipment of the 142 heads delivered on August 11th, same was found to tally but 141 heads and on taking this matter up with the contractor the additional head was then delivered on August 17th, but in view of this being merely a mistake in counting of the heads on the part of the contractor, it is our recommendation that the liquidated damage clause be not enforced so far as the delivery of this one head is concerned. This company is therefore 12 days late in completing its contract and according to the liquidated damage clause of \$25.00 per day will have to pay the city \$300.00 by reason of the non-completion of this contract on schedule time.

Will you please have prepared and forwarded for my approval the voucher covering the amount of these invoices including the release of the 15 per cent reserve on this contract as all the heads called for have now been delivered, and deducting the \$300.00 liquidated damages due the City.’ ”

You then state that a voucher was prepared in accordance with the above, and later it was returned with a letter

under date of October 13th, from the Commissioner of Gas and Electricity, which reads in part as follows:

"It seems that there was some misunderstanding between this company and the City as to who was to change the pattern for these heads, the contractor being under the impression that it was up to the City to make the necessary changes in the patterns before starting work on making these heads.

It also develops that the molder who was working for this contractor on these special castings was taken sick and away from work for a few weeks, thus further delaying the manufacture and delivery of these castings, with the result that this contractor was some twelve days late in completing the contract.

In view of the fact that the City suffered no damage in any way by reason of this slight delay, I would recommend that this contract be extended the necessary twelve days and the penalty clause waived.

Please arrange to change the voucher accordingly eliminating the \$25.00 per day damages for the twelve days in question and return to this office."

You then request an opinion as to the authority of the Commissioner of Gas and Electricity to waive a damage clause of this kind.

We have this day advised you (See Opinion No. 1688) that a contract, such as the one in question, cannot be lawfully altered or amended by parol.

As to extensions or additions to the work covered by said contract, your attention is invited to Article 18 thereof, which is as follows:

"In the event that any material alterations or additions are made as herein specified, which in the opinion of the Commissioner of Gas and Electricity will require additional time for the execution of any work under this contract, then in that case the time of the completion of the work shall be extended by such a period of time as may be fixed by said Commissioner, and his decisions shall be final and binding upon both parties hereto, provided that in such case the Contractor, within four (4) days after being notified in writing of such alterations or

additions, shall request in writing an extension of time, but no extension of time shall be given for any minor alterations or additions, and the provisions of this article shall not otherwise alter, change or invalidate the provisions of this contract with reference to liquidated damages and the said Contractor shall not be entitled to any damages or compensation from the said City of Chicago on account of such additional time required for the execution of the work."

From the facts submitted it is apparent that no attempt was made to comply with the foregoing provision of the contract, and that in the absence of such compliance such extension cannot be granted.

Respectfully submitted,

ROY S. GASKILL,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Selling Milk from Dairy Wagon.

October 22, 1926.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

This is in reply to your letter under date of October 13, 1926, in which you requested an opinion as to the legality of selling milk from a wagon on the street. We note, from the letter which accompanied your request, that a driver for the Borden Dairy Company, of the name of B. F. Landahl, has been selling malted milk to high school students; that the wagon from which the driver makes his sales is stationed across the street opposite to 5846 Glenwood avenue; and that

the driver remains in this location from about 12 o'clock noon until 1 P. M.

Section 1933 of The Municipal Code of 1922 requires every person, firm or corporation engaged in the business of selling or disposing of milk or cream to pay annually a license fee graded according to the size of the business as determined by the number of wagons or other vehicles used. This section provides further, "Such person, firm or corporation shall *also* pay an additional annual license fee for each vehicle used for the delivery *or sale* of milk or cream, as follows: * * *."

The right to sell milk in or from a wagon by parties having a license is granted by the foregoing section. However, this right does not authorize the licensee to station his vehicle at a given point upon the street and there carry on his business. Section 3735 of The Municipal Code makes it "unlawful for any person, firm or corporation to erect, place or maintain in, upon or over any street * * * any fruit stand, lunch stand, lunch wagon * * * or any other arrangement or structure for the display or sale of goods, wares or merchandise, or for the pursuit of any occupation whatsoever, unless a permit for the same shall be obtained. * * *"

Does a person having a license to sell milk from a wagon violate Section 3735 by stopping at a particular point for a period of about one hour? The ordinance in question (Section 1933) governs dealers in milk and cream who have permanent places from which their business is carried on, and those who sell from vehicles to any person who may buy from them. The last mentioned class of dealers in milk and cream have been termed *peddlers* by the Illinois State Supreme Court (*City of Chicago v. Bartel*, 100 Ill. 57).

The license issued to the Borden Dairy Company to sell milk from its wagons (assuming it has a license for each of its wagons) authorizes it to conduct its business in the same manner as other peddlers licensed to peddle from wagons.

We are of the opinion that a peddler would not violate The Municipal Code if he required only one hour to supply his customers at a given place.

We are of the opinion that any party having a license as a milk vendor may sell his products from his vehicle, and may occupy the street at a particular point where his customers may be found for such reasonable length of time as it would require him to supply their wants. We believe in the present case sixty minutes would not be an unreasonable length of time unless traffic was impeded.

Yours very truly,

EDWARD M. QUINN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Damages for Removal of Shade Trees.

October 23, 1926.

HON. DONALD S. MCKINLAY, Alderman, 19th Ward.

Dear Sir:

Your communication addressed to the Corporation Counsel requesting an opinion as to the liability of the City to an abutting owner for damages arising by reason of the removal of certain shade trees made necessary by the installation of new curbing at a point on the street where the parkway had been reduced in width, has been referred to the undersigned for consideration and reply.

In the case of *City of Mt. Carmel v. Shaw*, 155 Ill. 37, our Supreme Court held that a City organized under the general act may do anything with its streets not incompatible with the end for which streets are established, and the exercise of its discretion in locating a sidewalk upon a street will not be interfered with by the courts, and at page 43 the court said:

“Shade trees in the public streets of a city are the property of the municipality, and it has complete control over them (*Baker v. Town of Normal*, 81 Ill. 108.)”

See also opinion of Corporation Counsel, dated July 24, 1903 (Page 402, Vol. 1897-1905).

I am of the opinion that no liability attaches to the City of Chicago for the removal of the trees in question.

Respectfully submitted,

ROY S. GASKILL,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Claim for Exemption from Fee for Inspection of Ventilating Installation.

October 27, 1926.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.

Dear Sir:

We are in receipt of your letter under date of October 22, 1926, in which you request an opinion as to whether the claim of the Chicago College of Osteopathy for exemption from payment of Comptroller's Warrant F13757 may be allowed.

We note the Chicago College of Osteopathy is a corporation organized not for pecuniary profit; and that the warrant in question was issued on account of an inspection of the mechanical ventilation equipment of the college made by the City under authority of Section 2155 of the Municipal Code.

Section 2155 provides:

“An annual inspection of all mechanical ventilation equipment in *public* and semi-public buildings and places of employment shall be made by the Commissioner of Health to see that the same is in proper operating condition. The fee for the annual inspection shall be fifty cents per one thousand cubic feet or fraction thereof, of air handled per minute. Such annual inspection fee shall be paid in advance to the City Collector on the first day of March of each year.”

The ordinance makes no distinction between public or semi-public buildings which are used for profit and those which are not used for pecuniary gain. In the construction of statutes the term public building includes any college, academy, schoolhouse or other building generally used for instruction purposes. And the term public building as used in all laws relative to the employment of labor, means all buildings or premises used as a place of instruction or assemblage (Words and Phrases Judicially Construed, Vol. 6, page 5776). It is clear the buildings of the Chicago College of Osteopathy come within the terms of the ordinance.

The ordinance expressly states the fee for the inspection made by the Commissioner of Health “*shall be fifty cents per one thousand cubic feet * * * of air handled per minute.*” This provision is mandatory.

The imposition of a reasonable inspection fee is not a tax, and is usually regarded as compensation for the benefit conferred by such inspection. “Inspection laws are not regarded as imposing burdens upon trade, nor as unjustly discriminating in favor of one class at the expense of another, so long as they are reasonable.”

People v. Harper, 91 Ill. 357.

C. W. & V. Coal Co. v. People, 181 Ill. 270.

The fact that the Chicago College of Osteopathy is a corporation organized not for profit does not exempt it from the terms of the ordinance. Thus, the Board of Education, which is a non-pecuniary corporation is liable for the payment

of inspection fees chargeable by reason of inspections made by the City. (See Opinions of the Corporation Counsel, 1923-1924, page 258.)

Places of worship, such as churches, are not exempt from the payment of inspection fees. (Opinions of the Corporation Counsel, 1911-1912, page 8.)

In our opinion, the claim of the Chicago College of Osteopathy for exemption from payment of the inspection fees imposed by Section 2155 cannot be allowed.

Very truly yours,

EDWARD M. QUINN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Hours for Closing of Bridges.

October 27, 1926.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

Your letter of October 6th, last, suggesting that this office investigate the authority of the City with reference to the establishment of suitable periods during which the bridges over the Chicago river may be ordered kept closed, is received.

This entire question was disposed of effectively and completely by the decision of the United States Supreme Court in the case to which you have referred, viz, *Escanaba Company v. Chicago*, 107 U. S. 678. We have had occasion to draw attention to the rule therein announced on several occasions heretofore when the same subject was under consideration.

That case was decided in 1882, but the question does not appear to have been considered as one of first impression even at that early date. Reference is there made to a number of other cases where the same question had previously been before the court, and the rule as previously announced and confirmed in the *Escanaba* case has not since been departed from.

In the *Escanaba* case, a shipping company filed a bill in the Federal Court to restrain the enforcement of an ordinance of the City of Chicago designating periods of the day when the bridges over the Chicago river should be closed, and providing that at certain other periods bridges should not be left open for a longer time than ten minutes in order to permit the passage of a vessel. The trial court sustained the ordinance, and its decree was affirmed by the United States Supreme Court. Federal jurisdiction of navigable waters, the court there pointed out, was reserved by the Commerce clause of the Federal Constitution, and by subsequent legislation immediate jurisdiction over such navigable waters was vested in the War Department, but the court pointed out that this could not be held to be a complete divestiture of the power of the States to regulate within their limits matters of internal police, which power embraces the construction of roads, canals and bridges and the control and regulation of them, that such control was in a great measure largely a matter of local concern and should be within reasonable limits committed to local authorities. But the court pointed out that the power of regulating local traffic by means of the construction and regulation of bridges, being local in its nature, could not be held paramount to the power of Congress to prescribe suitable and proper regulations for vessel traffic on navigable waters; that this latter was necessarily a matter of more than local concern and must be held to be paramount. The practical effect of the rule as established is that the State, and the City by virtue of delegated authority from the State to regulate roads, bridges, highways, etc., may make such regulations as it sees fit and as in the circumstances may seem reasonable and necessary concerning the opening and closing of bridges over navigable waters, and that such regulations have all the force

and effect of law, but that they are apt to be superseded at any time by Federal enactment or by the orders or regulations of the War Department established pursuant to the clearly delegated authority of that Department. The Federal power lies dormant until exercised, and until its exercise the local authorities may establish such regulations as may be required. A municipal ordinance designating periods of the day when the bridges shall remain closed is properly authorized if not in contravention of Federal regulations, but such ordinance independent of the Federal question is of course always subject to the test of reasonableness the same as any other general police ordinance. An appeal of course may always be taken from a municipal regulation to the War Department through its district engineer, and the War Department undoubtedly has the last word in determining when the bridges may be ordered closed.

As a matter of practical effect, therefore, the City may by ordinance make such reasonable regulations with regard to the opening and closing of bridges as in the judgment of the City Council may be necessary, so long as such regulations do not contravene any Federal regulations. Inasmuch as the War Department has assumed jurisdiction of the navigable waters of this vicinity, including the Chicago river, the practical and expedient thing for the City to do in making regulations of this character is to cooperate with the War Department and get that Department's approval of any such ordinance. This could best be effected by an order from the War Department confirming the purposes, objects and intent of such ordinance. Any attempt to act independently of the War Department would simply result in confusion and misunderstanding. Whenever your Department considers it necessary and advisable to establish any regulations different from existing regulations with reference to the opening and closing of bridges or any other matters concerning the use of navigable waters, we would suggest that you outline a program, have it approved by the district engineer, put it in ordinance form for submission to the City Council, and if passed, have it confirmed and approved by the War Department. In

the final analysis there is no escaping the paramount authority of the Federal Government.

Yours truly,

JAMES J. COUGHLIN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

**Power to Compel Street Railway Company to Place
Feed Wires Underground.**

October 27, 1926.

HON. LEO J. WINIECKI, Commissioner of Public Service.

Dear Sir:

Your letter of the 13th instant, requesting this office to advise you if the Chicago City Railway Company may be required to place their feed wires underground in Ashland avenue, south from 47th street, is received.

In reply we beg to inform you that the paragraph entitled "Feeders and transmission wires" in Exhibit B to the 1907 Ordinance fixes the underground area as that portion of the City lying east of the west line of Halsted street, north of the south line of 39th street, and south of the main Chicago river, and also south of 39th street, east of the right-of-way of the L. S. & M. S. Railroad. It is further provided that all feed wires in any other territory shall be similarly placed underground whenever the City shall require all other overhead public service wires in such territory to be placed underground. If the area in question therefore is underground territory for the service wires of the other utility companies,

the Chicago City Railway Company may likewise be required to place its feed wires underground, otherwise not.

Very truly yours,

JAMES J. COUGHLIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Fire Escapes on Buildings Used for Boxing
Exhibitions.**

November 1, 1926.

HON. JOHN PLANT, Chief Fire Prevention Engineer.

Dear Sir:

In reply to your inquiry addressed to the Corporation Counsel relative to application of the fire ordinances of the City of Chicago to buildings in which boxing exhibitions are or may be licensed to be held by the State Athletic Commission, would say that the statutes creating said Commission and defining its powers and duties, was enacted in June, 1925, and on a referendum therein provided, said act was adopted in the City of Chicago at the April election, 1926. The act in question is known as Chapter 10b of the Illinois Revised Statutes, and Section 18 thereof is as follows:

“All the buildings or structures used, or intended to be used, for the purpose of this Act shall be properly ventilated and provided with fire exits and fire escapes, if need be, and in all manner conform to the laws, ordinances and regulations pertaining to the buildings in the city, town or village where situated.”

For your convenience I hand you herewith two copies of said act in full.

Respectfully submitted,

ROY S. GASKILL,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

License Fees for Baseball, Football and Other Games and Exhibitions.

November 3, 1926.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

In response to your request we have prepared, and we submit herewith, an ordinance designed to place a license for purposes of revenue on baseball, football, track and field games, and other athletic exhibitions of like character.

In the memorandum submitted with your letter you point out that the Athletic Commission has full charge of professional athletics, including such games and contests as those just mentioned, but that for some reason the City has not seen fit to collect a percentage of the gate receipts therefrom, and has contented itself with an annual license fee for the grounds, which, when distributed over the number of games played therein, amounts to merely a nominal fee for each. You point out also that the City is put to a great expense at all these contests by reason of the fact that it is necessary to have a special detail of policemen to handle the crowds, and in many cases additional special details held in reserve.

You also pointed out that a percentage of the gross receipts were collected in the case of wrestling matches, bicycle

races and bowling matches, and that there did not appear to be any reason for discriminating in favor of the other athletic contests first mentioned.

The City has ample authority to impose such a tax as you suggest, under Clause 41 of Section 1, Article V, of the Cities and Villages Act, which empowers the City Council as follows:

“To license, tax and regulate baseball exhibitions, wrestling matches, walking matches, automobile races, bicycle races and all other athletic contests and exhibitions carried on for gain, such tax to be fixed or based on the gross receipts derived from the sale of admission tickets to such exhibitions, matches, races or other athletic contests, said tax, however, not to exceed three per cent of such gross receipts.”

The ordinance we have prepared contemplates a tax of three per cent on gross receipts in addition to the licensing of the place of amusement, but provision is made for deducting the annual license fee in cases where the owner of the grounds operates the game or exhibition. We consider this proviso necessary in order to overcome any point that might be raised as to such total tax being in excess of the limit of three per cent.

We do not believe it is necessary at this time to make any alterations in the Code with reference to the Athletic Commission's powers over wrestling matches, even though these powers have been taken away by statute, but we confine ourselves in the proposed amendatory ordinance to such changes as will give the Commission the necessary power over baseball, football, etc. The said ordinance is in shape for you to forward to the City Council if you see fit.

Yours truly,

LEON HORNSTEIN,

Approved: *First Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Powers as to Opening of Michigan Avenue at 63d Street by Special Assessment.

November 4, 1926.

HON. ROBERT E. BARBEE, Alderman, 17th Ward.

Dear Sir :

Your letter concerning the proposed opening of Michigan avenue underneath the tracks of the New York Central Railroad Company at 63d street was referred to the writer for attention.

You state that under the track elevation ordinance passed by the City Council in 1894, as amended on January 18, 1897 (Council Journal, pages 1461-1465), the money for the work would have to be deposited either with the railroad company or some reliable concern, and you asked us to suggest the manner in which the money might be raised for that purpose.

The ordinance in question limits the manner of constructing or extending the street across the tracks to a subway underneath such tracks. It provides also that the railroad company should do the work, and that before it does the work the money would have to be placed in its hands or in some responsible bank for its benefit. These provisions raise an insuperable obstacle to doing this work by special assessment, unless the railroad company is willing to come to some new agreement with the City on this point. Therefore, the only way in which funds can be appropriated to this purpose is by drawing on the general corporate fund or by authorizing an issue of bonds to defray the expense thereof.

Yours truly,

LEON HORNSTEIN,
Acting Corporation Counsel.

Building Line Requirements for Apartment Building.

November 10, 1926.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

This will acknowledge the receipt of your letter of October 22d enclosing a communication from B. Leo Steif and Company, architects, relative to a large apartment building to be erected at the corner of Grace street and Sheridan road. Sheridan road at this point turns from a general northerly course to a generally westerly course.

The premises upon which the proposed apartment building is to be erected are in an apartment district. Section 22 of the Zoning Ordinance provides for building lines for buildings to be erected in apartment districts.

It appears that plans for the proposed buildings were previously presented to you and you refused a permit because the structure was not in compliance with the provisions of Section 22 of the Zoning Ordinance; that an appeal was then taken to the Board of Appeals for a variation to permit the erection of the building in violation of Section 22 of the Zoning Ordinance; and that the Board of Appeals denied the appeal.

The architects now contend, however, that the plans, which are the same plans upon which you heretofore refused to issue a permit and wherein your decision in so doing was affirmed by the Board of Appeals, are in conformity with the provisions of the Zoning Ordinance. In their letter which you transmit they set forth certain contentions. You wish to be advised whether you should issue the permit.

We do not believe there is any merit in the argument of the architects that the proposed building may be erected without providing for a building line on any of the streets upon which the building fronts or faces.

It is true that the lots upon which the building is to be erected are not of uniform depths, are of irregular shape and peculiar proportions and that they front on Grace street, on Sheridan road running in a general northerly direction and on Sheridan road running in a general westerly direction.

But if for these reasons there is any unnecessary hardship or practical difficulties in the way of carrying out the strict letter of the Zoning Ordinance, the alteration or relaxation of the provisions of Section 22 is a matter for the Board of Appeals to determine.

We do not believe you should issue the permit for the building under the plans presented, as we think it would be in violation of Section 22 of the Zoning Ordinance.

Very truly yours,

WILLIAM L. SULLIVAN,

Assistant Corporation Counsel

Approved:

LEON HORNSTEIN,

Acting Corporation Counsel.

Location of Oil Filling Station Near Church.

November 12, 1926.

MR. JOHN PLANT, Chief Fire Prevention Engineer.

Dear Sir:

This will acknowledge receipt of copy of a letter written by you to this department on October 14th, the original of which apparently was never received in this office.

It is proposed to install tanks for an oil station at 701-705 Oakwood boulevard. Proper frontage consents have been filed but the plot of ground upon which the tanks are to be placed is within 65 feet of a building known as St. James M. E. Church.

You enclose copy of a letter from Albert W. Harris of the Harris Trust and Savings Bank, who is chairman of the Board of Trustees of the church, to the effect that the said church building is not being used for church purposes or any other purpose at the present time, but is standing vacant.

It also appears from information received from Mr. Harris' office that church services were last held in this church building December 31, 1925, and that since that time the church building has been vacant; that it will probably be torn down; that a new church has been erected by the congregation at 4601-4617 Ellis avenue where the regular religious services of the congregation are now being held.

Section 2279 of The Chicago Municipal Code of 1922 prohibits the installation of tanks "in any lot or plot of ground where any of the boundaries of any such lot or plot of ground are within 200 feet of the nearest boundary of any lot or plot of ground used for a school, hospital, church or theatre."

The question arises whether the St. James M. E. Church at 701-705 Oakwood boulevard, which is within 200 feet of the plot of ground in which the tanks are to be installed, is used for a church within the meaning of the ordinance.

A church within the meaning of the above provisions must be construed as including any building which is regularly used for purposes of divine worship (See Opinions of Corporation Counsel of 1912, page 833).

It is evident that the St. James M. E. Church at 701-705 Oakwood boulevard is not being regularly used for purposes of divine worship at the present time.

While the building thereon is built in the usual form of a church structure, yet the use of the building rather than its architecture is what controls as the prohibition contained in the ordinance reads "any lot or plot of ground used for a church * * *" (See Opinion of Corporation Counsel to Superintendent of Police, October 20, 1926).

It is our opinion that, in so far as we are advised, the plot of ground in which the proposed tanks are to be installed is not within 200 feet of a plot of ground "used for a church" at the present time within the meaning of the provision of the above ordinance.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

Liability for Medical Expenses of Employee While Taking Civil Service Examination.

November 13, 1926.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

Your communication addressed to the Corporation Counsel relative to the claim of Patrolman Edward J. Heerey for \$363 to cover medical and hospital expenses incurred by him as a result of an injury sustained by him while taking a civil service promotional examination, has been referred to the undersigned for consideration and reply.

In your letter you refer to a resolution of the City Council of June 29, 1922, concerning the payment of claims "for hospital and medical expenses of policemen and firemen injured while in the actual performance of their duty," which said resolution is as follows:

"Resolved, That it is the sense of the City Council that claims of policemen and firemen to be considered for payment from the aforesaid appropriation shall be such claims as may arise on account of hospital and medi-

cal expense incurred as the result of injuries due to the hazards of the duties performed by policemen and firemen, and not to accidents which are liable to happen to any individual during the ordinary course of business or work * * *."

The only question involved is whether or not Heerey was injured due to the hazards of the duties performed by him as a policeman.

The rules of the Civil Service Commission, as amended and in force November 15, 1925, provide the method of promotion within the classified service. Section 2 of Rule V provides in part as follows:

"Promotion examinations shall be held when the next lower rank * * * contains two or more eligible persons desirous of taking examination. Should not more than one eligible candidate register, or should all candidates fail to pass, an original entrance examination shall then be held."

Section 1 of Rule V provides in part as follows:

"The Commission shall investigate and ascertain the merit or efficiency in service of the persons submitting themselves to examination, * * *"

Section 2 of Rule II, provides in part:

"Applicants for promotion examinations shall register in the office of the Commission prior to the beginning of such examinations."

From the foregoing it is apparent that the taking of a civil service promotional examination is optional with all candidates who may be eligible. They are not required to participate in such examinations, and may only do so by making application therefor in accordance with the rules of the Commission. While participating in such examination they are performing no duties required of them in the course of their employment as such policemen, but are seeking to

demonstrate their fitness for promotion by reason of their qualifications and experience acquired in the lower rank.

I am of the opinion that the above quoted resolution of the City Council does not cover the claim in question.

I return herewith the documents submitted in relation to the foregoing claim.

Respectfully submitted,

ROY S. GASKILL,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Street Lighting System on Structure of Elevated Railroad.

November 16, 1926.

HON. JOHN T. MILLER, Commissioner of Gas and Electricity.

Dear Sir:

Your communication addressed to the Corporation Counsel, relative to the proposed cancellation of the tripartite agreement of February 27, 1923, between the City of Chicago, the Woodlawn Business Men's Association and the South Side Elevated Railroad Company, authorizing the installation of a street lighting system on the structure of the railroad company on east 63d street, and the maintenance and operation thereof by the City of Chicago, has been referred to the undersigned for consideration and reply.

In your letter you state:

"Under date of July 8, 1926, * * * the City Council passed an ordinance revoking contract ordinance granting permission to the Woodlawn Business Men's

Association to install and operate an ornamental street lighting system on east 63d street, * * * and providing for transfer of this street lighting equipment to the City.

"This ordinance provides that the consent of the South Side Elevated Railroad Company be obtained as a matter of form to the transfer to the City of the sole ownership and supervision of the present street lighting system along this street between the above mentioned limits."

* * * * *

"On taking up with the South Side Elevated Railroad Company the matter of obtaining the necessary consent to the revocation of the above contract ordinance, they advise that before giving their consent to cancellation of the original contract, they desire to enter into a contract with the City approved by proper ordinance, for the operation of such lights as are to be maintained along their structure after the removal of such lights no longer to be used and fixing the liability for the operation of this system."

The tripartite agreement of February 27, 1923, hereinabove referred to, contains, *inter alia*, the following:

"South Side Elevated Railroad Company hereby consents and agrees to the installation, maintenance and operation of said lighting system on its elevated structure in 63d street between the points specified and on the terms and conditions above set forth without charge by it therefor to either the Woodlawn Business Men's Association or the City of Chicago.

In consideration of such consent and agreement, the Woodlawn Business Men's Association agrees to indemnify and save harmless the Railroad Company against and from all cost, damage or expense, including claims, suits or demands for injury or damage to persons or property or for the death of any person, arising out of or resulting from anything done or omitted by said Association, its agents or contractors, in connection with the construction and installation of said lighting system prior to the time when the same is turned over to the City or after the same may have reverted to the Association as hereinabove provided.

The City of Chicago, in consideration of such consent and agreement, agrees that it will indemnify and save harmless the Railroad Company, its successors, lessees and assigns, against and from all cost, damage or expense, including claims, suits or demands for injury or damage to persons or property or for the death of any person, in any manner arising out of or resulting from the installation on or attachment to the railroad structure by the City of any wire, cable, fixture or other equipment connected with said lighting system or arising out of or resulting from the presence, maintenance or operation of said system or any part thereof upon the railroad structure after the same has become the property of the City, as hereinbefore provided, and so long as the same shall continue to be maintained thereon by the City."

Notwithstanding the fact that the foregoing is a tripartite agreement, the writer is of the opinion that the City has power to abrogate same without consent of the railroad company. We suggest, however, that in view of the passage of the ordinance revoking the ordinance granting permission to the Woodlawn Business Men's Association to install and operate the lights in question, that a new agreement be entered into between the City and the Railroad Company concerning the subject-matter under consideration.

We return herewith the original agreement of February 27, 1923, together with the original contract and bond of December 28, 1922, which were submitted by your department for our inspection.

Respectfully submitted,

ROY S. GASKILL,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Power of General Assembly to Grant Rights in City Streets to Street Railway Companies.

November 28, 1926.

HON. JOSEPH B. McDONOUGH, Chairman, Committee on Local Transportation.

Dear Sir:

On November 17th you wrote to the Corporation Counsel requesting an opinion in answer to the following questions:

“(1) May the General Assembly of Illinois, without requiring or providing for the consent of local authorities of municipalities in whose streets street railway tracks are laid, grant to a street railway company or authorize any state officer or other state authority to grant to such street railway company the right to operate a street railway in the streets of any such municipality during any definite or indefinite period of time after expiration of any license, permit or consent theretofore granted by the authorities of such municipality?

“(2) May the General Assembly of Illinois grant or authorize any state officer or other state authority to grant to a street railway company the right to construct and operate as part of a street railway system during any definite or indefinite period of time extensions or additions to such a street railway system in or along the streets or public places of an incorporated city, town or village without requiring or providing for the consent of the local authorities of such city, town or village to the construction and operation of such extensions or additions?”

Your second question seems broader than the first but on analysis, we think, a single answer may be given to each question. By your second question, you ask whether the General Assembly of Illinois, without requiring or providing for the consent of the local or municipal authorities, may by law authorize a street railway company to construct and op-

erate its street railway or extensions thereof, i.e., to lay down its tracks and otherwise to install its physical structures—in streets or portions of streets within an incorporated city, town or village. This would of course subject to the burdens of street railway operation streets and public places never before used for such street railway purposes.

Your first question, on the other hand, assumes such street railway company or its predecessors to have theretofore constructed its street railway tracks and physical structures in the streets of a municipality with the consent of the municipality and under authority of a grant of the right to use such streets for street railway purposes during a fixed and definite term. In view of the laws now and heretofore existing in Illinois we may assume such fixed term grant to have been by municipal ordinance and for a period not exceeding twenty years. You then ask whether the General Assembly of the State, without requiring or providing for the consent of local municipal authorities having charge over such streets, may, after expiration of said fixed term grant heretofore made or assented to by the municipality, lawfully authorize such street railway company to continue the operation of its street railway upon and along streets and public places within any incorporated town or village where its tracks and physical structures are already laid down and installed.

That a street railway company, which has laid its tracks and constructed its plant in public streets and ways under a fixed term grant, has no further rights in such streets after full expiration of that term and may be required to remove its tracks and structures from such streets by appropriate order, is too well established to admit of doubt. In *Detroit United Railways Company v. Detroit*, 229 U. S. 39, the Supreme Court of the United States laid down the rule as follows (pages 45-46) :

“The right to grant the use of the streets was in the City. It had exercised it, had fixed by agreement with the Railway the definite period at which such rights should end. At their expiration the rights thus definitely granted terminated by force of the terms of the instru-

ment of grant. The Railway took the several grants with knowledge of their duration and has accepted and acted upon them with that fact clearly and distinctly evidenced by written contract. The rights of the parties were thus fixed and cannot be enlarged by implication (Citing cases).

“We are of the opinion that where a street railroad is authorized to operate in the streets of a city for a definite and fixed time, and has enjoyed the full term granted, it may, upon failure to renew the grant, be required, within a reasonable time, to remove its tracks and other property from the streets.”

In that case the U. S. Supreme Court affirmed the decision of the Supreme Court of Michigan in *Detroit United Railways Company v. Detroit*, 156 Mich. 106, in which that court had held the company to be without rights in streets where its franchise grants had expired. In *Denver v. New York Trust Company*, 229 U. S. 123, the U. S. Supreme Court likewise held that a water company whose franchises for use of streets had expired by limitation of term had no further rights in the streets and could be required to remove its structures therefrom. That action was brought against the City by the trustees of a mortgage upon all the properties and franchises of the Denver Water Company and it was contended that the City, having reserved in its grant the right to renew the franchise or to purchase the properties of the company at an agreed valuation, was obliged to do one thing or the other. The court, however, held both reservations to be mere options for the benefit of the City and that the City not having used either option might exercise any other advantage accruing to it by the expiration of the franchises without depriving the company of any property right protected by the constitutions of state or nation. In the later case of *Denver v. Denver Union Water Company*, 246 U. S. 178, the court referred with approval to its former decision (page 186).

In *Detroit United Railways v. Detroit Company*, 248 U. S. 429, the court approved its former decision in *Detroit United Railways Company v. Detroit*, 229 U. S. 39, saying:

“There can be no question that it was within the city’s power to compel the company as to its non-franchise lines to remove its tracks from the streets of the city. This was settled in *Detroit United Railway v. Detroit*, 229 U. S. 39.”

And again in *Detroit United Railways Company v. Detroit*, 225 U. S. 171, the court referred with approval to its decision in *Detroit United Railways Company v. Detroit*, 229 U. S. 39, and *Denver v. New York Trust Company*, 229 U. S. 123, as settling the right of a municipality to require a public utility to remove its structures and facilities from streets, wherein it no longer has a right of user because its franchises or licenses have expired.

In *Bankers Trust Company v. Raton*, 258 U. S. 328, the court in a case arising from New Mexico affirmed the same doctrine and stated the law as follows (page 335):

“We may say, however, that the supreme court of the state in *Raton Waterworks Co. v. Raton*, 22 N. M. 464, 164 Pac. 826, said the franchise of the company was granted by an ordinance of the city, and certainly the bill in this case shows that its term was fixed at twenty-five years from July 25, 1891. The term, therefore, had expired when the amended bill was filed. The term of the rights having expired, necessarily the rights granted expired, and the city cannot be enjoined from requiring the removal of the company’s system from the streets of the city.”

This long continued line of decisions from the highest court of the nation abundantly sustains the proposition that any law authorizing a street railway company to continue the operation of its street railways in streets wherein its fixed-term franchise grants shall have expired by limitation is a grant of new and different rights for the use of such streets as fully as would be a law authorizing construction of street railway tracks in streets where no such tracks have heretofore been located. The authorities clearly show that after expiration of its franchise grants the company has no right to maintain its tracks or structures in the streets and any fur-

ther operation in such streets cannot be deemed a continuation of rights theretofore granted by the municipality.

May the General Assembly of this State grant such new and different rights of street user to a street railway company whose franchise grants have expired without requiring or providing for the consent of the local municipal authorities having charge over the streets to be so used?

The General Assembly has paramount authority over all public ways within and without the limits of municipal corporations and may authorize their use for any recognized street use except in so far as such authority is limited by the Constitution. This principle must be conceded and does not require the citation of authority. However, Section 4 of Article XI of the Constitution of 1870 reads as follows:

“No law shall be passed by the General Assembly granting the right to construct and operate a street railroad within the city, town or incorporated village, without requiring the consent of the local authorities having the control of the street or highway proposed to be occupied by such street railroad.”

That section is a distinct limitation on the powers of the Legislature and has been so held many times by our Supreme Court. In *Byrne v. Chicago General Railways Company*, 169 Ill. 75, the court in upholding the power of a city to exact an annual car license fee when granting the right to construct and operate a street railway in city streets said (referring to said Section 4, Article XI), at page 83:

“Under the Constitution not even the Legislature has the power to grant the right to construct and operate a street railroad within a city without the consent of its common council.”

In *Venner v. Chicago City Railway Company*, 258 Ill. 523, that court, in upholding the trust agreement by which properties of the Chicago City Railway Company, Calumet and South Chicago Railway Company and Southern Street Railway Company (three of the companies now included in

the Chicago Surface Lines) were to be operated together under their existing ordinances passed in 1907, 1908 and 1909, respectively, said (page 546) :

“The Constitution commits to the City the control of the operation of street railways in its streets. It is for the City to determine whether such operation shall be competitive or monopolistic; *to grant the privileges to many or confine it to one.*”

In *People v. Chicago Railways Company*, 270 Ill. 278 (the Chicago Railways Company is the member of the Chicago Surface Lines not before the court in *Venner v. Chicago Railway Company*, *supra*), the court, citing with approval *Byrne v. Chicago General Railway Company*, *supra*, and *Venner v. Chicago City Railway Company*, *supra*, again stated the rule in the following language (page 294) :

“The power of the city council, under our constitution and laws, is absolute to prescribe the terms upon which street railway companies may lay tracks in the streets and operate them.”

The cases cited arose out of acts occurring before the passage of the Public Utilities Act of 1913, and all except the case of *People v. Chicago Railways Company*, *supra*, were decided before passage of that act. The latter case was decided in October, 1915, or more than two years after said Public Utilities Act was passed. The case arose, however, out of facts occurring before passage of that act and the construction of that act itself was not necessary to decision of the case. In the cases cited the constitutional right of the City to assent or refuse to assent to the use of its streets for street railway purposes has been stated affirmatively. In cases cited hereafter, involving construction of the Public Utilities Act, the court is at all times concerned with the power to the State to regulate existing utilities without violation of the Constitution, and references to the above named section will be in language of limitation and exception. Nevertheless the court has at all times clearly and consistently rec-

ognized the fundamental and constitutional right of municipalities to determine whether their streets may be used for street railway purposes, and the consequent inability of the General Assembly to authorize such use by any law that does not provide for the assent of local authorities to such use.

In *Public Utilities Commission v. Chicago & West Towns Railway Company*, 275 Ill. 555, the company contended that provisions in the Utilities Law concerning the filing of tariffs and the collection of fares solely in accordance with such tariffs were unconstitutional for various reasons, including violation of said Section 4 of Article XI. The court denied the company's contentions and stated the limits of the application of said section, but at the same time plainly recognized the force thereof when applied to a grant of original or new rights of street user. At page 570, the court said:

“The public utilities act does not violate section 4 of article II of our constitution. That provision is simply a limitation of the general powers of the legislature, and in one particular, only. *It provides, in substance, that the legislature may not grant the right to construct and operate a street railroad within a municipality without requiring the consent of the local authorities having control of the streets or highways proposed to be occupied.*”

In *City of Chicago v. O'Connell*, 278 Ill. 591, the power of the Public Utilities Commission to make and enforce service orders differing from or contrary to provisions relative to service contained in municipal ordinances was before the court for construction. That case has since been deemed the leading case construing the authority of the General Assembly to enact the utilities law under the State's police power. The court cited with approval the decisions of *Venner v. Chicago City Railway Company*, *supra*, and *People v. Chicago Railways Company*, *supra*, as limited by the decision in *Public Utilities Commission v. Chicago & West Towns Railway Company*, *supra*, and then said (page 601):

“The statement made in *Venner v. Chicago City Railway Co.*, *supra*, * * * that the constitution

commits to the city the control of the operations of street railways in its streets, merely means that *the constitution has conferred upon the city power to determine whether street railways shall be operated upon the streets of the city, and if so, upon what streets.*"

The constructions given to said Section 4 of Article XI in *Public Utilities Commission v. Chicago & West Towns Railway Company*, and in the *O'Connell* case, were later approved by the court in *Public Utilities Commission v. City of Quincy*, 290 Ill. 360 (a leading rate case), and in *City of Chicago v. Chicago Railways Company*, 292 Ill. 190 (in which case the power of the Commission to change street railway rates on the Chicago Surface Lines was under consideration), and in *Hoyne v. Chicago and Oak Park Elevated Railroad Company*, 294 Ill. 413 (the case relative to rate changes on the elevated railroads in Chicago), the court again stated the constitutional distinction between the right of municipalities to consent or refuse to consent to street railway operation within their streets and the power of the Legislature either acting directly or through the State Utilities Commission to exercise the police power of the state for the regulation of the rates and services of street railways lawfully existing and operating in the streets of a municipality. At pages 417-418 the court stated the law as follows:

"Section 4 of article II of the constitution of 1870 provides: 'No law shall be passed by the General Assembly granting the right to construct and operate a street railroad within any city, town or incorporated village, without requiring the consent of the local authorities having the control of the street or highway proposed to be occupied by such street railroad.' * * * The right of the State to regulate or fix the rates for street railway companies is neither abridged nor denied by this section of the constitution. *This provision simply requires the consent of the municipal officers to the construction and operation of a street railway and that no law shall be passed granting such right without such consent. While such consent, with or without terms, is essential to authorize such a railway to construct and operate its road, yet it is not a correct proposition to*

say that any and all contracts, legal and illegal, by which such consent may be given may be enforced. Certainly no good lawyer would contend that a contract between such a railway company and such officers giving such consent on condition that the railway company should pay each of such officers \$1000 per annum during the life of the contract could be enforced. Any legal and reasonable contract not infringing upon the right of the State to exercise its police powers in the interest of public safety, welfare, comfort or convenience would be binding upon such railway company and the municipality."

In view of the long and consistent line of decisions quoted and cited above, we are clearly of the opinion that both of your questions should be answered in the negative, and that any statute enacted by the General Assembly, in so far as it attempted, without providing for municipal consent thereto, to grant to a street railway company either the right to use City streets after expiration of any license, franchise, permit or consent of the municipality or the right to construct and operate such street railway or extensions thereof in streets not theretofore used for street railway purposes, would be unconstitutional and null and void.

Yours very truly,

C. M. DOTY,

Approved:

Assistant Corporation Counsel.

FRANCIS X. BUSCH,

Corporation Counsel.

Frontage Consent Petitions for Gasoline Filling Station.

November 22, 1926.

MR. JOHN PLANT, Chief Fire Prevention Engineer.

Dear Sir:

This will acknowledge receipt of your letter of November 15th, requesting the views of this department.

It appears that application was made to you for a permit to install tanks for a gasoline filling station at 2200-2210 West Van Buren street; that a frontage consent petition was presented; that said frontage consent petition was reported by the Superintendent of Maps to contain a surplus of 3.59 feet; that a permit to install said tanks was thereupon issued by your bureau; that upon the frontage consent petition appears the name of Mary L. Banks as signing for lots 42 to 48; that Mary L. Banks is the owner of the fee of said lots, but that the People's Institute Building Corporation has a lease expiring in 1998 of the premises; that the latter corporation owns a building thereon; that it objects to the installation of the tanks; that it contends that Mary L. Banks was without authority to sign said frontage consent petition; that her interest in the property is subject to the interest of the People's Institute Building Corporation. The People's Institute Building Corporation asks that the permit be revoked.

Section 2279 of The Chicago Municipal Code of 1922 provides that "It shall be unlawful to install any tank or tanks * * * in any lot or plot of ground without first obtaining the written consents of the *property owners* representing the majority of the total frontage in feet of any lot or plot of ground lying wholly or in part within lines 150 feet distant from and parallel to the boundaries of the lot or plot of ground upon which said tank or tanks is or are to be installed," etc.

The question arises, then, whether Mary L. Banks as the owner of the fee to said lots is a "property owner" within the meaning of the above ordinance and had the right to sign the frontage consent petition filed herein.

Somewhat analogous questions have been presented to this department in the past. Years ago Corporation Counsel John W. Green held that a tenant was not entitled to sign a similar kind of frontage consent petition but that such petition must be signed by the owner of the fee. Printed Opinions of Corporation Counsel of 1897, page 123.

Again the question arose whether consent to a petition for a saloon license under an ordinance requiring consents of property owners could be signed by the owner of a life estate, and this department held that the owner of a life estate had not the right to sign such a frontage consent but that such a petition must be signed by the owner of the fee. Opinion of Assistant Corporation Counsel Rothmann, Printed Opinions of 1905, page 1063.

“The Supreme Court of this state,” the latter opinion declared, “in construing the word ‘owner’ as used in connection with real estate, says that, ‘the word owner has been repeatedly determined to mean a fee simple interest in the land. *Jarrot v. Vaughn*, 2 Gilm. 138; *I. M. F. Insurance Co. v. Manf. Co.*, 1 Gilm. 236; *Wright v. Bennett*, 3 Scam. 459; *Whiteside v. Divers*, 4 Scam. 336; *Merritt v. Kewanee*, 175 Ill. 551.) The foregoing definition has been uniformly adhered to by the Supreme Court. It is a well known rule of construction that, when words have acquired a meaning through judicial interpretation, it is to be presumed that such words were used in that sense in subsequent statutes. (The *Abbotsford*, 98 U. S. 440.) It must, therefore, be presumed that the framers of the ordinance above quoted in using the expression ‘property owners’ intended the word ‘owners’ to have that meaning which the Supreme Court had repeatedly given it, namely, owners of a fee simple interest. It follows, therefore, that the owner of a life estate is not such an owner as is contemplated by the ordinance and has not the right to sign a petition.”

In a more recent case it appeared that the Chicago Rapid Transit Company as owners of the fee of property on the west side of Calumet avenue between 61st and 63d streets signed a frontage consent petition to permit the erection of a garage. It was objected to the petition that the said west side of Calumet from 61st to 63d streets had been used for several years as a small park; that at the time of the signing of the frontage consent petition by the Chicago Rapid Transit Company the said property was being used and kept up

by the Small Parks Commission of the City of Chicago; that the signature of the Small Parks Commission of the City of Chicago, which pays for the upkeep of said property, should be obtained in place of that of the Chicago Rapid Transit Company, which owned the fee; that this park represented a twenty thousand dollar investment and its usefulness would be destroyed by the proposed garage.

In holding that the owner of the fee had the right to sign the frontage consent petition this department, in an opinion by Assistant Corporation Counsel Doty, said:

“Section 929 of The Chicago Municipal Code of 1922 provides that frontage consent petitions shall be signed by the ‘majority of property owners according to frontage on both sides of the street.’ As checked and certified by the Bureau of Maps and Plats, The Chicago Rapid Transit Company is the owner in fee of lots and parcels of land on the west side of Calumet avenue between East 61st and East 63d streets, having a frontage of 1262.24 feet on Calumet avenue. We are of the opinion that such ownership makes said Company the proper party to sign such frontage consent petition, and that it is immaterial to what use said lands may, with the consent of such Company, be devoted by others as licensees or tenants thereof.” Opinions of Corporation Counsel of 1925, page 413.

We are, therefore, constrained to advise you that in our opinion Mary L. Banks, as the owner of the fee, had the right to sign the frontage consent petition. In so far as any matter in relation thereto has been called to our attention we think the permit was lawfully issued and that you would be without legal authority to revoke it.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Referendum on Traction Propositions.

November 22, 1926.

HON. JOSEPH B. McDONOUGH, Chairman, Committee on Local Transportation.

Dear Sir:

We have your communication of the 17th inst. in which you request the opinions of the Corporation Counsel in answer to the following questions:

“(1) May propositions covering the essential elements of the various plans and proposals for settlement of the City’s local transportation problem now pending before the Committee be lawfully submitted to the electors of the City for their advisory approval or rejection?

(2) May such propositions be submitted at a special election to be called for that purpose by the City Council?

(3) If questions 1 and 2 are answered in the affirmative, what procedure would be necessary to provide for submitting such propositions at a special election?”

After careful examination of the election laws of the state, we are of the opinion that the only statute under authority of which such propositions may be submitted to the electors of the City for the purposes indicated by your first question is the “Public Policy Act,” approved May 11, 1901. The purpose of that act is to provide a means for obtaining “an expression of the public sentiment upon the enactment of a new law by the proper authorities or the repeal or amendment of a law already upon the statute books.” There can, therefore, be no doubt that questions carefully framed to secure the advice and opinion of the electors of the City on the essential elements of plans and proposals for settlement of so important a problem, before the City Council shall

pass an ordinance having the force of law, would be questions of public policy within the meaning of that act. Your first question is answered in the affirmative.

Section 1 of said Public Policy Act reads as follows:

“That on a written petition signed by twenty-five per cent of the registered voters of any incorporated town, village, city, township, county or school district; or ten per cent of the registered votes (voters) of the state, it shall be the duty of the proper election officers in each case to submit any question of public policy so petitioned for, to the electors of the incorporated town, village, city, township, county, school district or state, as the case may be, at any general or special election named in the petition: Provided, such petition is filed with the proper election officers in each case not less than sixty (60) days before the date of the election at which the question or questions petitioned for are to be submitted. Not more than three propositions shall be submitted at the same election and such proposition shall be submitted in the order of its filing.”

Your second question asks whether such questions may be submitted at an election especially called for the purpose of submitting such questions. We are of the opinion that by its terms said act is limited to the submission of questions of public policy at elections otherwise called or provided, and that it does not authorize the calling of a special election for the sole purpose of submitting thereat one or more such questions. The election at which said written petition is, under the statute, to authorize the proper election officers to submit any public policy question or questions to the electors, must be *named in the petition*, and the petition is required to be filed with such election officers not less than sixty days before the *date of the election so named*. Such provisions presuppose the calling of said election and the fixing of the date thereof before the petition is prepared for or signed by the number of petitioners required by the statute to authorize submission of such question. They can not relate to a special election to be called by the City Council after being informed of the preparation or filing of such petition or to comply with the

terms of such petition. The act does, however, provide for submission of such questions of policy at any *general or special* election that may otherwise be called in and for the City, and we do not intend by this opinion to pass upon the submission of such questions to the electors at any election called to approve or disapprove a complete ordinance for settlement of the local transportation problem, nor do we pass upon the power of the City Council to provide for submitting any complete ordinance to the electors of the City whether under the Mueller Law, the Municipal Ownership Act, or otherwise. Your second question as stated is, therefore, answered in the negative.

The negative answer given to your second question makes it unnecessary to answer question (3) in so far as it relates to procedure for submitting such questions at a special election called for that purpose. The terms of the statute as quoted sufficiently indicate the procedure for submitting such questions at any other general or special election in and for the City, and require no further comment. For your information it should, however, be suggested that the number of registered voters in the City as shown by the books of the Board of Election Commissioners after revision of the October registrations is 875,281. Any petition under said Public Policy Act at the present time would, therefore, require the signatures of not less than 218,821 registered voters. This latter figure is subject to change as to any petition presented in the future by any new or additional registrations, and would probably be increased rather than decreased thereby.

Very truly yours,

C. M. DOTY,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Power of City on Unpaid Water Bill Upon Meter
Installation.**

November 22, 1926.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We are in receipt of your communication of November 18, 1926, in which you ask for an opinion as to your power and authority to enforce collection or to shut off or cut off the water "where the semi-annual bill for water assessed rates for a period as provided for under the ordinances has been forwarded to the owner or occupant of premises and said bill has been paid for said period and subsequently a water meter has been installed on the premises," and in answer will say that we have carefully examined The Chicago Municipal Code of 1922, and the ordinance passed by the City Council of the City of Chicago September 1, 1925, as amended July 22, 1926, and we fail to find any provision in said code or ordinance giving you power or authority to enforce collection or shut off or cut off the water in the situation as above quoted.

Very truly yours,

THOMAS W. FLYNN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Disposition of Money Found by Civilian and Turned Over to Police.

November 23, 1926.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

In accordance with your request of November 18, 1926, as to the disposition of a sum of money found by a civilian and turned over to the Central Bureau and now in the possession of the Custodian's office, we submit herewith a copy of an opinion, rendered under date of April 24, 1924, to your department, concerning the law governing "lost property."

"By general rule of the common law, one who finds and appropriates a lost chattel acquires the title thereto and the right of possession thereof against all the world except the true owner.

25 Corpus Juris, page 1136.

Our State Statute, Chapter 50, Paragraphs 27 and 28, (Smith-Hurd Revised Statutes 1925) governing 'lost property,' is as follows:

"If any person or persons shall hereafter find any lost goods, money, bank account * * * of the value of \$5 and upwards, it shall be the duty of such person or persons to inform the owner thereof, if known, and to make restitution of the same without any compensation whatever, except the same shall be voluntarily given on the part of the owner; but if the owner shall be unknown, such person or persons shall, within five days after such finding as aforesaid, take such goods, money, bank notes * * * before some justice of the peace of the proper county, and make affidavit of the description thereof, the time and place when and where same was found, that no alteration has been made in the appearance thereof since the finding of same, whereupon the justice shall enter a description of the property thus found and the value thereof as near as he can ascertain, in his estray book, together with the affidavit of the finder,

to be taken as aforesaid; and shall also, within ten days after the said proceedings shall have been entered on his estray book as aforesaid, transmit to the county clerk a certified copy thereof, to be by him recorded in his estray book, and to file the same in his office."

Paragraph 28 provides:

"* * * shall not exceed the sum of \$15 * * * but if the value thereof shall exceed the sum of \$15, it shall be the duty of the county clerk, within twenty days from the time of the reception of the justice's said certificate at his office, to cause an advertisement to be set up on the court house door, and in three other of the most public places in the county and also a notice thereof to be published for three weeks successively in some public newspaper printed in this State; and if the said goods, money, bank notes, or other choses in action, be not reclaimed within six months after the advertisement thereof as aforesaid, it shall be the duty of the finder * * * to deliver same to the county treasurer after deducting the necessary expenses hereinafter provided for; * * * the proceeds of all such sales, after deducting the costs and other expenses shall be paid into the county treasury."

Paragraph 30 provides:

"All costs of proceedings in the matter of an estray or other property taken up or property found, shall be paid by the taker-up or finder in the first instance, and if he is not repaid by the owner of the property, such costs shall be refunded to him out of the proceeds of the sale of such property."

Chapter 37, Paragraph 390, Sub-paragraph 4 (e) (Smith-Hurd Revised Statutes 1925) provides that the Municipal Court of Chicago has jurisdiction in all actions and proceedings of which justices of the peace are now given jurisdiction by law.

As between the right of the police custodian to retain the money and the finder to secure its return, the latter's is superior and the money should be returned to him and he

should be advised as to the law above quoted so that he may proceed accordingly.

Yours truly,

EDWARD M. QUINN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

License Fees for Professional Tennis and Hockey Matches.

November 24, 1926.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

In your letter of the 23d inst. you state that a question has arisen as to the City's authority in granting permits for professional tennis and hockey, and the tax or license fee therefore. You ask whether, under the ordinances as they stand at present, the City is entitled to 3 per cent of the gate receipts on exhibition games and matches played by professional tennis and hockey players.

Under date of November 3, 1926, we forwarded to you an opinion and draft of an amendment to Sections 181 and 196 of The Chicago Municipal Code of 1922. Our opinion was to the effect that under the statutes the City had authority to tax baseball, football and track and field games as well as those athletic contests which it was now collecting fees on. The latter include wrestling matches, bicycle matches, bowling matches and "other athletic contests and exhibitions." (See Sec. 196 of Code.)

We judge from your letter that the only question that has not been fully determined is whether such sports as ten-

nis and hockey come within the "other exhibitions of like character" included in amusements of the 10th class, or whether they are among the "other athletic contests and exhibitions" in the 21st class. The wording of the 10th class is "all baseball, football, track and field games or other athletic exhibitions of like character," which are generally regarded as healthful outdoor sports largely indulged in by amateurs as well as professionals. The language of the 21st class is "all bicycle races, bowling matches and other athletic contests and exhibitions." (Sec. 176 of Code.)

Under Section 195 of the code the Athletic Commission is vested with powers in regard to wrestling matches (an amusement of the 11th class), and under Section 196 it is given certain duties in connection with "bicycle races, bowling matches and other athletic contests and exhibitions." By Section 199 provision is made for taxing the admission fees of "wrestling or other athletic exhibitions or contests."

Manifestly, it was the intention of the City Council to tax only lightly such outdoor sports as amateurs frequently participate in, but to tax more heavily such exhibitions as are almost always professional when an admission fee is charged and they are carried on indoors, as wrestling, bicycle races, bowling matches and other athletic exhibitions and contests of that character. There did not appear to be sufficient reason for making such a distinction, thereby letting such exhibitions as baseball, football and track and field games go with but a light tax. Hence, at your request, we prepared the amendatory ordinance mentioned above, which was designed to include in the tax all the exhibition sports and games designated in the 10th class of amusements. This has not yet been enacted.

The question now presented is whether such professional tennis and hockey games as are carried on in the Coliseum and like places escape licensing altogether, on the theory that they are track and field games of the 10th class, when they are carried on in a hall that is not licensed as a place of amusement.

Such a construction of the provisions of the code mentioned herein is not warranted. These professional exhibitions clearly come within the contests and exhibitions which are to be taxed. Their professional character brings them within the purpose and intent of the ordinance, and besides, it cannot be claimed that they are track or field games when they are carried on indoors. The doctrine of *ejusdem generis* must be applied to the clause "all baseball, football, track and field games or other athletic exhibitions of like character," and therefore the other exhibitions mentioned in the 10th class cannot include professional indoor tennis and hockey contests.

We are, therefore, of the opinion that Section 199, as it now stands, is sufficient authority to exact the license fees provided for therein from exhibitions and contests of professional tennis and hockey.

Yours truly,

LEON HORNSTEIN,

First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Location of Dispensary in Building Used for Residential Purposes.

November 26, 1926.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health

Dear Sir:

This will acknowledge receipt of your letter of November 22d.

It is proposed to establish at 118 West Grand avenue a dispensary on the first floor of a building, the upper two

floors of which are used for residence purposes. You wish to be advised whether a dispensary license may be issued for the first floor of the building and the two upper floors be used for residence purposes, or whether the entire building must be licensed for dispensary purposes.

Article VIII of Chapter XXXIX including Sections 1832-1840 of The Chicago Municipal Code of 1922 is entitled "Dispensaries," and contains the City ordinances relating to the licensing, conduct, accommodation, inspection, etc., of dispensaries.

We are unable to find anything therein which expressly requires that an entire building must be licensed for dispensary purposes. Neither is there any express prohibition in the ordinances against the use of upper floors of a building for residence purposes where a dispensary is located on the first floor.

But there is, however, a discretion vested in the Commissioner of Health relative to the location of such an institution by Section 1834 thereof which provides in part as follows:

"It shall be the duty of the commissioner of health, upon the presentation of such application, to make, or cause to be made, strict inquiry into the facts set out in such application, *and if upon such inquiry he shall find such dispensary is or is intended to be so constructed and equipped as to afford proper accommodations for the care of the persons treated or proposed to be treated therein*, and that the physician or physicians or intended physician or physicians thereof will give or is or are under agreement to give such attendance therein as will render him or them responsible professionally for the medical or surgical treatment given or to be given to any and all indigent persons applying thereto, and that such physician or physicians is or are regularly authorized to act as such under the laws of the State of Illinois, *then the said commissioner of health shall recommend to the mayor that a license be issued*, and upon the payment by the applicant of the license fee hereinafter provided to the city collector, the mayor shall issue or cause to be issued a license, attested by the

city clerk, authorizing such applicant to open, conduct, manage or maintain for the current municipal year a dispensary at the place, in the manner and for the purpose in such application set forth."

The above section makes it your duty, when application is made for a license to operate a dispensary, to determine whether such dispensary is or is intended to be so constructed and equipped as to afford proper accommodations for the care of the persons proposed to be treated therein, etc.

The plain purpose of this provision is to place upon the Commissioner of Health the responsibility of deciding in the interest of the public health and of the safety and well-being of the patients to be treated therein the propriety of the location and establishment of dispensaries.

To determine this question in our opinion you should, among other things, take into consideration the fact that the upper two stories of the building are used for residence purposes, the construction and equipment or proposed construction of the building in which the dispensary is to be located, etc.

The City ordinances, as stated above, do not require that an entire building must be licensed for a dispensary when only the first floor of such building is to be used but, as stated above, it is for you to determine in the reasonable exercise of that sound discretion vested in you by the ordinance whether such first floor may properly be so licensed as a dispensary where the upper two floors are used for residence purposes.

Very truly yours,

WILLIAM L. SULLIVAN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Gas, Telephone and Electric Service for Fire Department.

November 29, 1926.

HON. LEO J. WINIECKI, Commissioner of Public Service.

Dear Sir:

Your recent communication addressed to the Corporation Counsel, requesting an opinion as to the powers of your department in the matter of making application for the securing of gas, telephone and electric service for the use of the Fire Department of the City of Chicago, has been referred to the undersigned for consideration and reply.

A careful consideration of Article I, Chapter LXIII of The Chicago Municipal Code of 1922, discloses that the duties of the Department of Public Service are confined to supervision and inspection; said duties being set forth with particularity in Section 3147 of said ordinance. We find no authority for said department making application for the furnishing of any commodity to the City by public service corporations or others; neither do we find any authority for the department to enter into contracts of any kind on behalf of the City.

Where a contract is entered into by a public service utility and the City, or with individuals, corporations, partnerships, etc., for furnishing the services enumerated in the ordinance, or where a grant is made by the City to any such public utility corporation or others furnishing such service, it is made the duty of the department to see that all laws and ordinances relating thereto are complied with and that the provisions of such grant are complied with by the grantee, and

make its report to the City Council when so required. The foregoing is in substance the extent of such powers.

Respectfully submitted,

ROY S. GASKILL,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Vacation of Original Peoria Street Between West
118th Street and West 119th Street, as
Recorded December 4, 1894.**

December 1, 1926.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We have your communication of October 8, 1926, requesting our opinion as to the validity of an enclosed instrument of vacation purporting to vacate Original Peoria street, as shown on a plat by you enclosed, or Original Peoria street, as originally platted, 135 feet east of the present South Peoria street, between 118th and 119th streets.

You say the City holds several tax deeds on a strip of land known as Original Peoria street. You also say that the City Real Estate Agent is holding a communication requesting an easement from the City in this strip of land.

We have examined the plat of the entire subdivision as appears on your books and also your attached copy of the deed of vacation and the original record thereof.

It would seem that the purported deed of vacation as recorded December 4, 1894, was intended to vacate all the north and south streets and alleys of the Placerdale Subdi-

vision between South Morgan street easterly to the Pittsburg Railway right-of-way, and 118th and 119th streets, with the exception of the east half of original Block 12 in this said Placerdale Subdivision, as recorded March 25, 1882. The statute in effect at the time when this deed of vacation was spread of record reads as follows (Starr and Curtis Ill. Stat. 1896, Vol. 3, page 2971) :

“VACATION OF PLATS.

6. *Of entire plat.*) Sec. 6. Any such plat may be vacated by the owner of the premises at any time before the sale of any lot therein, by a written instrument declaring the same to be vacated, executed, acknowledged or proved, and recorded in like manner as deeds of land; which declaration being duly recorded shall operate to destroy the force and effect of the recording of the plat so vacated, and to divest all public rights in the streets, alleys and public grounds, and all dedications laid out or described in such plat. When lots have been sold, the plat may be vacated in the manner herein provided by all the owners of lots in such plat joining in the execution of such writing.

7. *Of part of plat.*) Sec. 7. Any part of a plat may be vacated in the manner provided in the preceding section, and subject to the conditions therein prescribed: *Provided*, such vacation shall not abridge or destroy any of the rights or privileges of other proprietors in such plat: *And, provided, further*, that nothing contained in this section shall authorize the closing or obstructing of any public highway laid out according to law.”

We have made a personal examination of the premises and found that several buildings had been erected on the east side of and facing original Peoria street between 118th and 119th streets. It would seem that any water or gas that would be needed to supply these houses would have to come from 119th or 118th streets by way of original Peoria street. We have also examined the instrument on the original records. The instrument purports on its face to include all the owners of parts affected and concerned in said deed of vaca-

tion. We have also examined the indices of the tract books in the Recorder's office and find that several at that time owners of lots facing and adjoining the east side of original Peoria street between 118th and 119th streets, had not joined said instrument of vacation, filed December 4, 1894. Under the statute effective at that time, it was essential to have all the owners of property concerned join in this deed of vacation.

We are, therefore, of the opinion that said instrument of vacation recorded as Document 2142495, recorded December 4, 1894, is invalid and of no effect as far as original Peoria street between 118th and 119th streets is concerned. (*Chicago Pressed Brick Co. v. City of Chicago*, 138 Ill., page 638.)

We are not at this time passing upon the validity of the instrument concerning the other streets and alleys in said instrument of vacation referred to.

Yours very truly,

FRANK T. HUENING,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Limitations Respecting Suburban Funeral Directors.

December 2, 1926.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.

Dear Sir:

You forwarded to us a resolution adopted by the Suburban Funeral Directors' Association of Cook County, and you request an opinion with reference to the amendment of our ordinances proposed therein.

The gist of the resolution is that undertakers located beyond the City limits complain that the provisions of our ordinances which prevent the conducting of funerals and the removal of bodies from hospitals and other institutions within the City except by undertakers licensed by the City operate so as to deprive these suburban undertakers of work which they would otherwise be in a position to secure. The resolution states that these ordinances are "unreasonable, unfair and therefore invalid."

It is said in the resolution that Chicago undertakers are able to conduct their business outside of the City limits without being required to take out licenses in the outlying municipalities. Whether so broad a statement as this is correct need not be considered here, although in view of the rigid regulations governing undertakers within the City such practice would not be fraught with so much peril as if the case were reversed.

The resolution then goes on to say that the association is making an effort to secure the passage of uniform ordinances in all the municipalities of Cook County under which any embalmer licensed by the State will be able to secure burial and removal permits anywhere in the county upon the payment of a small fee and the presentation of the State license and the license of the municipality wherein such embalmer is located.

Any opinion which we may venture on the complaint and proposal would necessarily involve questions of policy, concerning which the Law Department is not usually asked for an expression. We might well say that it is a matter for the Department of Health to determine for itself whether it can properly control so dangerous an occupation within the City limits if the persons carrying on the business are not subject to its jurisdiction.

It is important to bear in mind that although an ordinance may be framed that would embody provisions satisfactory to you, its enforcement in other jurisdictions may be lax. The result may be that, while your responsibility as to

the public health will be the same, your ability to cope with offenders against the law who are located in other jurisdictions will be inadequate.

So far as the validity of our ordinances are concerned, our attention has not been directed to any specific thing contained in them which is regarded as invalid. We believe they will stand against an attack on the ground that persons not licensed by the City who are operating beyond the limits are not accorded the same privileges as persons duly licensed by the City.

We return herewith the draft of the resolution above mentioned.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Opening of Eighty-Third Street and Eighty-Seventh Street Under Railway Tracks.

December 6, 1926.

HON. ROSS A. WOODHULL, Alderman, 7th Ward.

Dear Sir:

Your letter of October 27th, last, requesting this office for information concerning the procedure necessary to accomplish the opening of 83d street under the New York Central and Pennsylvania tracks, and 87th street under the Illinois Central tracks, is received. Your letter also inquires whether it is possible to defray the cost of such opening by special assessment.

Under Sub-section 89 of Section 1 of Article V of the Cities and Villages Act, the City is empowered to extend streets across railroad rights-of-way. We understand from your letter that the tracks of these companies at the streets indicated are now elevated, and that no question of grade crossing is involved. Such being the case there is no occasion to invoke the jurisdiction of the Illinois Commerce Commission in order to accomplish the opening. The necessary procedure contemplates an ordinance directing the Corporation Counsel to condemn a right-of-way for the street across the railroad property. It is very frequently the case that this crossing easement can be secured by negotiation and agreement with the carrier so that court proceedings should be unnecessary. The right of the City to condemn such an easement is absolute. The carriers recognize this fact and there is no reason why an agreement should not be made without the necessity of any litigation.

If it is the intention to effect the opening of the streets mentioned by special assessment, the ordinance providing for the acquisition of the crossing easement should be followed by a local improvement ordinance. This latter ordinance should be in the same form as other local improvement ordinances. The items of cost to be considered are: first, the cost of the easement which should be nominal; second, the cost of cutting through the railroad fill and paving, curbing, grading, etc., of the street; and, third, the cost of conforming the railroad embankment, tracks, etc., to the improvement. In cases of grade separation coming within the jurisdiction of the Commerce Commission, these items of cost are generally apportioned between the interested parties in such proportions as the Commission may order. No particular rule is followed in such apportionments except that it is the purpose of the Commission to make such apportionment in accordance with the benefits to be derived. However, in situations of the kind you mention where there is no occasion for the intervention of the Commission, the rule is that the City shall pay to the railroad company whatever sum may be agreed upon for the easement. This, as above stated, should be nominal. The

City is required to pay the actual cost of opening the street across the railroad property, where as in the case of a subway this includes the cost of excavation, grading, paving, and, of course, the underground improvement. The railroad company must pay the cost of conforming its tracks and structure to the street opening. This should include the cost of shoring and supporting its structure, the cost of concrete abutments, if any are necessary, supporting columns and any other work that may be necessary to maintain its structure above the street. This latter principle has been thoroughly established in a number of cases considered by the United States Supreme Court, chief among which we call attention to the case of *C. M. & St. P. Railroad Company v. Minneapolis*, 232 U. S. 430.

It may be urged by the railroad companies that this matter ought to be submitted to the Illinois Commerce Commission, but we are firmly of the opinion that the Commission has no jurisdiction of this particular situation.

Section 58 of the Commerce Act provides that no public road, highway or street shall hereafter be constructed across the track of any railroad company at grade without the consent of the Commission having first been obtained. The second paragraph in this section provides that the Commission shall also have power, after a hearing, to alter or abolish any grade crossing or require a separation of grade at such crossing and to prescribe, after a hearing of the parties, the terms upon which such separation shall be made, and the proportion in which the expense of the alteration or abolition of such crossing, or the separation of such grades, shall be divided between the railroad companies and the municipality or other interested parties. The third paragraph of the section empowers the Commission to require the reconstruction, alteration, relocation or improvement of any crossing of any railroad across any street, whether such crossing be at grade, or by overhead structure, or by subway, whenever the Commission finds, after a hearing, that such reconstruction, alteration, relocation or improvement is necessary to preserve

or promote the safety of the public, etc. Provision is also made for the division of the cost of such reconstruction or alteration. The first and second paragraphs of this section contemplate grade crossings, and the jurisdiction of the Commission therefore under these two paragraphs can hardly be extended to the case you have in mind, inasmuch as a grade crossing is not intended. The third paragraph refers to the reconstruction, alteration or improvement of existing crossings whether at grade, or by overhead structure, or by sub-way. Inasmuch as the opening of the streets mentioned in your letter is not the reconstruction of existing crossings, this third paragraph can hardly be said to apply. There are no other provisions in the Commerce Act concerning the matter of railroad crossings, and inasmuch as this Section 58 has no application to the matter under consideration there is no occasion for considering any proceedings before the Commerce Commission.

With reference to your inquiry as to the possibility of constructing the improvement by special assessment, we know of no reason why this may not be done, providing it can be shown that it is a local improvement. Whether an improvement is local depends on whether the substantial benefits to be derived are local or general in their nature. A special assessment may not be levied for a general improvement, in the benefits of which all sections of the City may be said to participate alike, but where the improvement is projected for the immediate benefit of a particular locality it is clear that such an improvement is a local improvement, the cost of which may be defrayed by special assessment. We do not consider that you would have any particular difficulty in establishing the fact that the street openings you contemplate are calculated to benefit the immediate locality. The fact that the general public may participate to some extent in the benefits of the improvement does not destroy its local character so long as it may be shown that the immediate object of the improvement is to benefit the property against which the cost is assessed, and that such assessed property derives a particular advantage from the improvement not enjoyed by property

generally in the City. Without knowing more of the facts in your particular case, what we have said is the general rule adopted by the courts.

Yours very truly,

JAMES J. COUGHLIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Limited Extension of Authority to Operate Street Car Systems.

December 6, 1926.

HON. JOSEPH B. McDONOUGH, Chairman, Committee on Local Transportation.

Dear Sir:

At its meeting on Friday, December 3, your committee requested the written opinion of the Corporation Counsel whether, in view of the situation now existing and plans and proposals now pending before the Council for settlement of the local transportation problem of the City, it would be desirable for the City Council to grant, by ordinance or ordinances, to the Chicago Railways Company, Chicago City Railway Company, Calumet and South Chicago Railway Company, and the Southern Street Railway Company, constituting the Chicago Surface Lines, permission and authority to maintain and operate in the streets of the City the street railway systems of said companies, respectively, for the period beginning February 1, 1927, and ending July 31, 1927, subject to all the terms, provisions, conditions and limitations now in effect, under and by virtue of grants made to said companies by the settlement ordinances and the unification ordinance,

and all ordinances amendatory of and supplementary to those ordinances, but without prejudice to any right or rights now existing or which would exist in the City before or after said February 1, 1927, or at any time before or after said July 31, 1927, had such new ordinance or ordinances not been passed and without prejudice to the passage of any ordinance or the adoption of any plan by the City for final settlement of the local transportation problem with said companies or their successors, or with any other persons or corporations. The Settlement Ordinances referred to are the ordinances of February 11, 1907, granting to the Chicago Railways Company and the Chicago City Railway Company, respectively, the right to maintain and operate systems of street railways in the City; the ordinance of March 30, 1908, granting to the Calumet and South Chicago Railway Company the right to maintain and operate a system of street railways in certain portions of the City; and the ordinance of April 15, 1909, granting to the Southern Street Railway Company the right to maintain and operate a system of street railways in a certain portion of the City. The Unification Ordinance referred to is the ordinance passed November 13, 1913, entitled, "An Ordinance authorizing unified operation of the surface street railways in the City of Chicago," including the operating agreement attached as an exhibit to said ordinance and made a part thereof.

The grants made by said ordinances to the respective companies of the rights to maintain and operate their street railway systems in the streets and public ways of the City will expire by limitations contained in those ordinances on February 1, 1927. While the City would have the legal right, after such expiration of the rights of the companies to maintain and operate their street railway systems in the City, to require said companies to cease operating and to remove from the streets their street railway tracks and structures, it can not be doubted that your committee and the City Council will determine that street railway service in and throughout the City must be continued for the benefit of the public after the expiration of said grants. We are of the opinion that it

would be very undesirable, if avoidable, that said street railways should be operated in the City for any period, however short, merely at the will of sufferance of the City and without any municipal license, grant, franchise or permit for such operation, and subject to confusion, controversy or doubt concerning the terms and conditions of such operation or the obligations of the companies so operating. On the contrary, no effort should be spared that will result in definite and certain reciprocal obligations between the City and any operating companies for continuous street railway service in the City. The operation merely at sufferance and without definite license, grant, franchise or permit of the properties owned by four companies would endanger, or, at least, make uncertain continuance of the existing unification of services, whereby the properties of said four companies are operated in all respects as if owned by one corporation, with a single fare for travel throughout the City, universal transfer privileges between street railway lines, and extensive through-route service. In event the through-route, unified service of the City would in any way be impaired or discontinued, the central business district of the City would no doubt be increasingly congested by the terminals and loops required for the use of different operating companies.

Such operation as sufferance would also create uncertainty and confusion concerning obligations now existing upon the companies, other than the obligation to render street railway service—e. g., the obligation to pave, repave, repair and otherwise care for rights-of-way in the streets, to make definite provisions for a renewals and depreciation reserve and for a reserve for personal injury and damage claims, and to pay into the traction fund of the City certain portions of the divisible net receipts of the companies—and some of all of these obligations for the benefit of the City or for the protection of the people in the maintenance of continuous and effective street railway service might be lost.

In event the properties of any or all of the companies should be placed in the hands of receivers appointed by any

court, confusion and controversy would arise concerning the performance of such obligations by the receiver; while in event of such receivership during continuance of definite ordinance contracts between the City and the companies, setting forth the reciprocal obligations of the City and the company, the court would enforce and the receiver would comply with the terms and provisions of such contract in so far as the financial conditions of such company or companies would provide the means for performance of contracts. Of course any receiver appointed to take over the property and to operate the street railways of any or all of such companies would possess no greater legal right to use the streets of the City for such operation than would the companies under the same conditions, and such receiver would be obligated to operate such properties in accordance with service requirements of lawful, regulatory authority to the same extent that the companies would have been in the same situation. Nothing contained in this opinion is intended to indicate otherwise. Such receiver, however, would be obliged to strictly obey the orders of the court and to perform whatever obligations and only such obligations as might be definite and certain, and recognizable by the court as binding upon such company or companies.

Despite the utmost efforts to that end it is apparent that the various plans and proposals for settlement of the local transportation problem, now pending before your committee and nearing complete formation and submission to the City Council, cannot be so completed and submitted for approval of the electors of the City, in accordance with the established policy of the City before February 1, 1927. Also, some of whose plans, if adopted by the council and by the people, will, in order that the same may become binding and effective, require the passage of additional legislation by the General Assembly, empowering the City to make such grants and contracts as are by said plans proposed. The General Assembly will be in regular session from the 10th day of January, 1927, until the 30th day of June, 1927, and in event such plans are adopted and new legislation is sought, it may pass such laws

at any time during the session, and until the end of the session it cannot be certainly known what authority the City may be granted by which to make valid and effective provisions for final settlement of the problem that it can not now make.

Careful consideration of the problem discloses no way in which the passage of such new ordinance or ordinances, granting to the companies permission and authority to maintain and operate their street railways from February 1, 1927, to July 31, 1927, subject to such terms and conditions as described in your request for an opinion, would affect adversely any legal right or interest of the City, and we are, therefore, of the opinion that the negotiation and passage of such an ordinance or ordinances would be desirable, to the end that the mutual rights and obligations of the City and the companies may remain certain and definite during such limited time as shall be necessary to bring to completion plans now before your committee and to submit the same for approval of the people.

Yours very truly,

FRANCIS X. BUSCH,

Corporation Counsel.

C. M. DOTY,

Assistant Corporation Counsel.

Status of City Warrants as Contrasted to Negotiable Instruments.

December 7, 1926.

HON. JOHN A. CERVENKA, City Treasurer.

Dear Sir:

Your letter in reference to City warrants drawn by one municipal officer on another in the disbursement of the funds

of the municipality, has been referred to the undersigned for consideration.

From your letter it appears that when payment of a warrant is made through the Chicago Clearing House Association, a bank stamp in the following phraseology is affixed to the endorsement portion of the warrant:

“Paid through Chicago Clearing House April 10, 1924, to the Corn Exchange National Bank.”

It further appears from your letter that the foregoing bank stamp is used by regular members of the Chicago Clearing House Association, and that non-members or affiliated members of said association use a combination stamp as indicated in the following:

“The Consolidated Bank paid through Chicago Clearing House April 10, 1924, to the Corn Exchange National Bank.”

You ask if the Corn Exchange National Bank, in thus having its name stamped upon the warrant, undertakes the same responsibility as is undertaken by the endorser of a negotiable instrument.

The stamp used by the member or non-member of the Chicago Clearing House, when placed on the back of a negotiable instrument, constitutes a valid endorsement. The courts hold that where the name required has been placed on the back of the instrument with a rubber stamp by one having authority to do it and with the intent to endorse the instrument, this is a valid endorsement (3 R. C. L., page 969).

In construing the nature of a municipal warrant, the Court, in *People ex rel. v. Johnson*, 100 Ill. 537, states:

“We regard the rule well settled by considerations of public policy as well as by a decided preponderance of authority, that warrants or orders drawn by one municipal officer upon another in the disbursement of the funds of the municipality and payment of its indebtedness, are not to be regarded as negotiable or commercial paper cutting off equities against the corporation * * *

“Nevertheless * * * it has become quite common in business transactions to transfer these instruments by written endorsements, in the same manner as if commercial paper, and this usage or custom prevails to such an extent that many courts * * * have recognized the validity of such assignments, for the purpose, simply of enabling the assignee to sue in his own name, saving to the municipality all equities and defenses which would be available if the suit were brought in the name of the original payee.

“We perceive no substantial objections to this doctrine, and it is believed that public convenience will be promoted by its recognition. Indeed, the principle has already been recognized by previous decisions of this court.”

The foregoing case, which involved a county warrant, was referred to, and a part of the above language quoted, in *Morrison v. Austin State Bank*, 213 Ill. 472. The *Morrison* case pertained to a warrant of the Town of Cicero drawn upon a special assessment fund.

Justice Bradley, in *The Mayor v. Ray*, 86 U. S. 468, 477, in passing upon the nature of municipal warrants, used the following language:

“To invest such documents with the character and incidents of commercial paper so as to render them in the hands of *bona fide* holders absolute obligations to pay, however irregularly or fraudulently issued, is an abuse of their true character and purpose. It * * * puts it in the power of corrupt officials to involve a political community in irretrievable bankruptcy.”

This case was cited and a part of its language quoted by the court in *Wall v. Monroe County*, 103 U. S. 74, 78; *Clai-borne County v. Brooks*, 111 U. S. 400, 408; *Dist. of Columbia v. Cornell*, 130 U. S. 655.

There are decisions which hold that a municipal warrant, negotiable in form, possesses all of the qualities of negotiable paper save one, namely, that it is open to any defense which might have been made by the municipality to the claim upon

which it is founded (McQuillin, *Municipal Corporations*, Vol. 8, page 8022; *Bull v. Sims*, 23 N. Y. 570; *Woodworth v. School District*, 103 Wash. 677).

Where a negotiable instrument is involved, an endorser's undertaking makes him responsible to every holder, and to every person whose name is on the instrument subsequent to his own.

Does a municipal warrant possess such attributes of negotiability as will impose upon one endorsing it in blank the responsibility which the endorser of a negotiable instrument assumes in relation to every holder and to every party whose name appears on the instrument subsequent to his own? It does not appear that this particular question has ever been passed upon by the Illinois court.

The Minnesota Supreme Court, where a state warrant was involved, answered the above question in the affirmative. The State of Minnesota issued voucher warrants, viz, drafts drawn by the state auditor upon the state treasurer who accepted them, payable to members of the national guard who had served on the Mexican Border. The warrants were payable through state depositories. A clerk who handled the warrants, forged the endorsement of the payees upon several warrants, placed his own name beneath and deposited them in his own account in the X bank. This bank endorsed these warrants in blank and presented them through the clearing house to the Y bank, a state depository, which paid them. The Y bank endorsed them "Paid" with its own name beneath, and presented them to the state treasurer for redemption. The state sued both banks to recover the amount paid. The court held both banks were liable to the state; the X bank was primarily liable, and if the Y bank was obliged to pay, it could recover from the X bank the amount paid (*State v. Merchants National Bank*, 145 Minn. 322).

A municipal warrant drawn upon the general corporate fund, negotiable in form, possesses all the characteristics of a negotiable instrument. A municipal warrant, drawn upon a special fund, lacks one element of a negotiable instrument.

The law merchant required that an instrument should carry the general personal credit of the maker to be negotiable (1 Daniel Neg. Instrs., 5th Ed., Sec. 50). In accordance with this principle, any instrument payable expressly or by implication out of a particular fund is not negotiable, for its payment becomes then conditioned on the sufficiency of that fund which may prove inadequate (*Richardson v. Carpenter*, 46 N. Y. 660).

It is evident that warrants issued by a municipal corporation, although negotiable in form are not negotiable in the sense of the law merchant, so as to cut off in the hands of bona fide purchasers for value, or holders in due course, defenses or equities which might have been made against them had they remained in the hands of the original holder or payee. And the courts in construing a municipal warrant as being non-negotiable in this limited sense, seem to have had in mind the idea of protecting the municipality against irregular or fraudulent acts of its officers. Thus the Illinois court, in *People ex rel. v. Johnson*, *supra*, states warrants or orders "are not to be regarded as negotiable or commercial paper, cutting off equities against the corporation." The United States Supreme Court states that to invest municipal warrants with the incidents of commercial paper so as to render them absolute obligations on the municipality to pay, however irregularly or fraudulently issued, "puts it in the power of corrupt officials to involve a political community in irretrievable bankruptcy" (*The Mayor v. Ray*, 86 U. S. 468). The courts have said in effect: Municipal warrants, payable out of the general corporate fund, though negotiable instruments, belong to a peculiar class of such instruments, being made by a municipal corporation, and have no validity unless properly issued for a purpose authorized by law; if properly issued for a purpose authorized by law, they are invested with the character and incidents of commercial paper.

The Corporation Counsel is of the opinion that the endorser of a municipal warrant, which is drawn upon the general corporate fund, and which is negotiable in form,

probably would be held to have assumed the contractual liability which the endorser of a negotiable instrument assumes in relation to a subsequent purchaser for value or a holder in due course. This would promote public convenience and the present legal status of the municipality reference to unauthorized warrants would not be changed.

The City Treasurer could recover, probably, from the Corn Exchange National Bank in most cases where the insufficiency of any previous endorsement of a warrant, negotiable in form and drawn upon the general corporate fund, was proved.

Yours truly,

EDWARD M. QUINN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Location of Gasoline Filling Station Near Portable Schools.

December 7, 1926.

MR. JOHN PLANT, Chief Fire Prevention Engineer.

Dear Sir:

We are in receipt of your letter of December 2d relative to application for permit to install tanks for a gasoline filling station at 2352-2358 Foster avenue.

It appears from the report of the Superintendent of Maps that sufficient frontage consents were presented, but that the plot of ground in which it is proposed to install the tanks "is within 200 feet of portable schools, land not owned by the Board of Education." You wish to be advised whether you may lawfully issue the permit under these circumstances.

Section 2279 of The Chicago Municipal Code of 1922 provides that no such tank or tanks shall be installed in any lot or plot of ground where any of the boundaries of any such lot or plot of ground are within 200 feet of the nearest boundary of any lot or plot of ground *used for a school*, hospital, church or theatre.

You enclose with your letter a communication from Frank K. Gerty, Inspector of School Property of the Board of Education, to the effect that he sees no reason why a permit should not be issued as he is unable to see how it would be a detriment to the portable school building in question, being the Budlong Branch No. 1 School Building on the southwest corner of Claremont and Foster avenues.

You also enclose a communication from William J. Hargetigan, real estate manager of the Roxana Petroleum Corporation, to the effect that the owner of the property upon which the tanks are to be installed is also the owner of the property upon which the portable schools are located; that the School Board's lease on this ground runs out in a few months and the owner of the land does not intend to renew the lease; that inasmuch as the ground is not owned by the Board of Education and the existence of the portable school there is a temporary matter he thinks permit should be issued.

There is also presented a letter from Benj. Elser who owns the ground which is being leased by the School Board for the portable schools. This letter is to the effect that the lease of the School Board expires in April or May, 1927, and that he does not intend to renew it.

It is not disputed that the plot of ground upon which the tanks are to be installed is within 200 feet of the nearest boundary of a lot or plot of ground used for a public school. It is true that the public school buildings are portable school buildings and that the lease of the premises of the Board of Education will shortly expire, but while the portable school buildings are at the present location and being used for school purposes, we think the issuance of a permit to install tanks

within 200 feet thereof would be contravention of the ordinance.

The papers you forwarded to us are herewith returned.

Very truly yours,

WILLIAM L. SULLIVAN,

Assistant Corporation Counsel.

Approved :

FRANCIS X. BUSCH,

Corporation Counsel.

Examinations for Operators and Pumpers.

December 8, 1926.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir :

Under date of September 20, 1926, we received from you a communication which from our records seems to have been unanswered. It was, however, disposed of in the following manner :

The communication merely requested that we advise the Civil Service Commission as to the legal procedure to be followed in the matter of examinations for operators and pumpers in the Fire Department, and particularly with reference to the writs of mandamus ordered by the Superior Court and affirmed by the Appellate Court.

These examinations, by command of these writs, could be held only for filling the positions of Fire Engineers and Assistant Fire Engineers as these positions existed under the ordinances. It was sought, however, to have these examinations held for the positions called operators and pumpers to which all firemen should be deemed eligible. This being so clearly contrary to the writs which compelled obedience and

without any support from the existing ordinances, the Civil Service Commissioners were advised to hold the examination and certify the appointments for Fire Engineers and Assistant Fire Engineers exclusively.

The Commission was also advised that the new positions of operators and pumpers to which all firemen might be deemed eligible could be held only upon authority of an ordinance creating such positions and making them promotional to the firemen.

We have since been informed that the Commission has provided for the examinations in this case with the approval of the attorneys for the petitioners for whom the writs of mandamus were procured. No written opinion in the matter was submitted because the advice sought was to be given solely to the Civil Service Commission and they preferred to act in the manner indicated.

Very truly yours,

FRANCIS J. VURPILLAT,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Proposed Revocation of Driveway Permits.

December 8, 1926.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

This will acknowledge receipt of your letter of December 6th transmitting a communication from Attorney John J. Sonsteby and requesting the opinion of this department for your guidance in the manner of the revocation of driveway

permits and the action of the Department of Public Works in barricading certain driveways after their completion under permits issued by your department.

“The driveways permits had been issued,” you state, “as stated in the letter of Mr. Sonsteby, and subsequently, at the protest of Alderman John S. Clark, I issued a direction to the Superintendent of Streets revoking said permits. It appears that in the meantime the driveways had been completed. My order of revocation resulted in the action of barricading the said driveways.”

It appears from the letter of Attorney Sonsteby that his client, Karl Ring, as the owner of the premises at 4634-4632 Maypole avenue and of the premises at 4331-4345 West Adams street had erected a public garage on each of said premises; that on November 13, 1926, your department issued permits for driveways for each of said garages; that on November 15, 1926, your department issued work permits for said driveways; that the said driveways were immediately constructed by a licensed contractor; that on November 18th Karl Ring received a letter from the Superintendent of Streets purporting to revoke the permits but that when such letter of revocation was received the driveways had been completed; that on December 4, 1926, workmen from your department with policemen in attendance constructed barriers of wood across the driveways and threatened the owners, their employees and patrons with arrest if they removed said barriers or drove or permitted automobiles to enter or leave the said public garages; that at that time a large amount of space in the respective garages had been leased to individuals for storage purposes and cars of many of the patrons were in the garages.

It is claimed by Attorney Sonsteby that the driveways in question were constructed under permits issued by your department and in conformity with the ordinances of the City.

“My client complied in all respects,” states Mr. Sonsteby, “with the ordinances of the City of Chicago applicable to the

buildings of public garages and the construction of driveways, and I respectfully submit that it is absolutely unlawful for you or anyone in your department to erect the barricades complained of, and to interfere with the free use of said driveways, subject of course to the usual police regulations governing the use of all driveways.”

Attorney Sonstebly requests that you cause said obstructions to be immediately removed and allow the use of said driveways and advises that if you do not, he will immediately institute appropriate legal proceedings with relation thereto.

Sections 3565 to 3572 of Article II of Chapter LXII of The Chicago Municipal Code of 1922 set forth the ordinances with reference to the construction and maintenance of driveways, and as far as is necessary for our purposes provide as follows:

Section 3565 requires that where driveways are to be built across the sidewalk space, unless otherwise expressly authorized, they shall conform to the sidewalk grade, etc.

Section 3566 provides that no one shall construct or maintain driveways which depress or elevate the established grade of public sidewalks without first obtaining an order so to do from the City Council and a permit so to do as thereafter provided; that driveways over sidewalk space which do not elevate or depress the regular grade of sidewalks may be constructed and maintained upon permits issued by the Commissioner of Public Works without council order, provided they comply with the other requirements of Article II except that the Commissioner of Public Works may issue such a permit without requiring a bond as in the case of driveways which depress or elevate the grade.

Section 3567 provides for the making of application for a driveway permit and the details thereof; that plans and specifications shall be filed and be accompanied by a bond executed by the grantee, etc.

Section 3568 provides for the details as to the construction of driveways; that their location, construction and main-

tenance shall be under the direction and supervision of the Commissioner of Public Works; that the location and construction of same shall be in accordance with plans and specifications which shall first be approved by the Commissioner of Public Works, etc.

Section 3569 provides that permits for driveways shall contain the condition that same may be revoked by the Mayor or by an order passed by the City Council and signed by the Mayor at any time without the consent of the grantee, etc.

Section 3570 provides for the issuance of permits upon council orders.

Section 3571 provides that if any person, firm or corporation obtaining a permit under the terms of this article shall at any time fail or neglect to comply with the provisions of this chapter, then such permit may be revoked by the Commissioner of Public Works.

Section 3572 provides the penalty for the violation of the ordinance.

From the above it will be seen that while Section 3569 of Article II of Chapter LXII of The Chicago Municipal Code of 1922 provides that permits for driveways shall contain the condition that same may be revoked by the Mayor or by an order duly passed by the City Council and signed by the Mayor at any time without the consent of the grantee, yet under Section 3571 thereof the Commissioner of Public Works may revoke such a permit only in case the party obtaining it shall fail or neglect to comply with the provisions of Chapter LXXII, which is entitled "Sidewalks," and of which Article II thereof has the subtitle "Driveways."

There is no intimation in your letter that the said driveways were not constructed or were not being maintained in accordance with the ordinances of the City.

If it is a fact as contended by Attorney Sonstebly that the driveways in question were constructed under permits issued by your department and comply both as regards with construction and maintenance with the provision of the ordi-

nances, we are constrained to advise you as a matter of law that, in so far as we are informed in the matter, you would be without legal authority to revoke such permits or to barricade the said driveways to prevent their being used for the purpose for which they were constructed, and that by so doing you might render yourself liable in damages thereof.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Filling of Vacancies in Rank of Fire Engineer and Assistant Fire Engineer.

December 8, 1926.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

Your communication of December 3d, with request for an opinion relative to the filling of vacancies in the rank of Fire Engineer and Assistant Fire Engineer in the Fire Department, has this day been referred to us.

You state that "a policy has been adopted in making appropriations for the Fire Department since 1923 of gradually abolishing the rank of Fire Engineer and Assistant Fire Engineer by not filling vacancies as they occur. * * * In accordance with such policy the vacant positions unfilled at the end of the year have been dropped from the appropriation for the following year * * *." You state that the Fire Commissioner cites a court decision, case of *People ex rel. Watters v. Finn, et al.*, recently decided by the Appellate

Court, opinion by Justice McSurley, which the Commissioner says affects this situation.

You ask, on behalf of the Finance Committee for advice and opinion on the following matters involved, to wit:

“1. What are the legal complications affecting the continuation of the present policy of abolishing the rank by not filling vacancies?

2. If a new ordinance or the repeal or amendment of an existing ordinance is required will you kindly submit draft of same?

3. How can the present policy be carried out in so far as the wording of the appropriation item is concerned?”

As to proposition No. 1 we would advise that there are no “legal complications affecting the continuation of the present policy of abolishing the rank by not filling vacancies.”

As to proposition No. 2, we are of the opinion that no new ordinance or the repeal or amendment of an existing ordinance is required.

As to proposition No. 3, namely, the wording of the appropriation item to carry out your policy of abolishing these positions as vacancies occur therein we would respectfully advise as follows:

Instead of relying upon the general clause appearing at the head of the appropriation ordinance which we think is stated thus: “To be reduced in number during the year by not filling vacancies as they occur,” insert immediately following the specific appropriations for these positions of Fire Engineer and Assistant Fire Engineer a provision substantially as follows: Provided, however, and it is hereby so ordained by the City Council that, if any of said positions of Fire Engineer or Assistant Fire Engineer should for any cause become vacant throughout the year such positions shall thereupon and thereby be abolished and this appropriation for such vacated position shall no longer be effective but shall cease and terminate.

We think this fully covers your inquiry, and the same is respectfully submitted to your committee.

Very truly yours,

FRANCIS J. VURPILLAT,
Assistant Corporation Counsel.

Approved :

FRANCIS X. BUSCH,
Corporation Counsel.

Discrepancy in Public School Employees' Pension Fund.

December 9, 1926.

MUNICIPAL EMPLOYEES' ANNUITY AND BENEFIT FUND.

Gentlemen :

Complying with your request for an opinion concerning the alleged discrepancy in the Public School Employees' Pension Fund as turned over to the Municipal Employees' Pension Fund, the following is submitted :

Your letter transmits an attached memorandum in reference to an item of discrepancy in the amount turned over to the Municipal Employees' Annuity and Benefit Fund by the Public School Employees' Pension Fund at the time of the consolidation amounting to \$1,080.03. Your letter states that it appears that three engineer custodians of the Board of Education had originally been employees of the Village of Morgan Park prior to the annexation of that Village to the City of Chicago and had not been participants in either fund up to June, 1923, at which time they were taken into the Public School Employees' Pension Fund and allowed to pay up for their past services; that at that time the Board of

Education was contributing a like amount to the pension fund.

You propound the question, "Is the Board of Education liable for the same amount, \$1,080.03, that the employees paid into the Public School Employees' Pension Fund and allowed to pay for their past services?"

Section 17 (d) of the Municipal Employees' Annuity and Benefit Fund Act makes it the duty of Your Honorable Body to ascertain the amounts which have been deducted from the salary of each present employee who on June 30, 1923, was a contributor to the Public School Employees' Pension Fund, and applied to such pension fund between December 31, 1921, and July 1, 1923; and to credit to the account of such present employee an amount equal to the aggregate of all such deductions, together with interest thereon.

Section 52½ of the Municipal Employees' Annuity and Benefit Fund Act provides that all letters, securities and other assets of a Public School Employees' Pension Fund shall be transferred on July 1, 1923, by the Board of Trustees of such fund to your Honorable Body, or as soon as possible and practicable thereafter.

Section 1 of the School Employees' Pension Fund Act (approved May 15, 1903) provides that a Public School Employees' Pension Fund shall consist of amounts retained from the salaries or wages of employees and all moneys derived from any and all other sources whatever.

Section 6 of the School Employees' Pension Fund Act prescribes the powers and duties of the School Employees' Pension Board among which is the power and duty to take by gift, grant or bequest or otherwise, any money or property of any kind and hold the same for the benefit of the fund.

Section 1 of "An Act to provide for the contribution from public moneys to the Public School Employees' Pension Fund in cities having a population exceeding 100,000 inhabitants" (approved June 27, 1913) provides that the Board of

Education of any city having a population exceeding 100,000 inhabitants shall have power to annually set aside and appropriate and pay into the Public School Employees' Pension Fund, a sum of public moneys so that the same, when taken with the moneys added to such pension fund for the year from interest on school funds raised by taxes, as provided for by law, shall equal in amount not to exceed double the aggregate of the sums set apart for that year and contributed to such pension fund from salaries of persons in the employ of said Board of Education who are contributors to such pension fund.

Your letter states that at the time the three engineer custodians were taken into the Public School Employees' Pension Fund, the Board of Education was contributing "a like amount" to the pension fund. It is evident that at the time the three engineer custodians were permitted to become participants in the pension fund and to pay into the said fund, the contributions for the period of their past service, the Board of Trustees of the Public School Employees' Pension Fund failed to have the Board of Education contribute a like amount into the pension fund pursuant to its power so to do under Section 1 of the Act of 1913 hereinabove referred to.

Upon the facts as given to me, I am of the opinion that the attention of the Board of Education should be called to the fact that in the contribution set aside and appropriated and paid by it into the Public School Employees' Pension Fund, for the year 1923, or for that portion of the year up to and including June 30, 1923, the Board of Education overlooked the receipt by the pension fund of the contributions from the three engineer custodians, and consequently failed to contribute an equal amount from the public moneys, leaving a deficiency of \$1,080.03 in the said pension fund at the time the said fund was merged with the Municipal Employees' Annuity and Benefit Fund; and that a request should be made upon the Board of Education to remit to your Honorable Body the amount of said deficiency, with interest thereon, as

successors to the trustees of the Public School Employees' Pension Fund.

Very truly yours,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Credit Rights of Municipal Employee After Resignation Has Been Cancelled.

December 9, 1926.

RETIREMENT BOARD, MUNICIPAL EMPLOYEES' ANNUITY & BENEFIT FUND.

Gentlemen:

Complying with your request for an opinion as to the credit rights of a municipal employee after his resignation has been cancelled, the following is submitted:

Your letter states that an employee of the City of Chicago resigned before January 1, 1922; that after January 1, 1922, this person had his resignation canceled and his name restored to the list under a different title and salary; that this course was followed by the Civil Service Commission to reinstate a man and save him from taking another examination.

Your inquiry presents the following questions:

1. Is this person a "municipal employee" on January 1, 1922, and if so, under which title and salary?
2. If he is a "municipal employee" on January 1, 1922, should he receive credit for service from the date of resignation to December 31, 1921; or, under Section 51 of the Muni-

cial Employees' Annuity and Benefit Fund Act, would he be considered to be separated from the service after his resignation?

3. Would having a leave of absence substituted for his resignation, in place of having his resignation canceled, alter the circumstances?

I.

Section 12 of the Municipal Employees' Annuity and Benefit Fund Act, as it applies to the City of Chicago, specifically defines a municipal employee as any person who was, is or shall be employed by the City of Chicago as a civil service appointee and any person employed by the City who was appointed to the service of the City prior to January 1, 1922. The employee in question could not be considered a "present employee" because he was not in the employ of the City on December 31, 1921; neither can he be classed as a "future entrant" because he did not become employed as a municipal employee of the City "for the first time" on and after January 1, 1922.

II.

Section 36 of the Municipal Employees' Annuity and Benefit Fund Act, as it applies in this instance, provides that any municipal employee who shall not be in the service of the City on December 31, 1921, and who was in such service prior to that date and who shall re-enter the service after that date and before attaining sixty-five years, shall not have any right to be credited with any sum or sums for prior service annuity, and shall not have any right to prior service annuity, but the period of service rendered by any such municipal employee prior to January 1, 1922, shall be included in computing the term of service of such municipal employee for age and service annuity and widows' annuity purposes. "Service" has been construed by our Appellate Court as meaning "actual service" (*Carpenter v. City*, 199 Ill. App. 558).

Section 51 of the Municipal Employees' Annuity and Benefit Fund Act provides that in computing the term of service rendered by any municipal employee prior to January 1, 1922, the entire period of time beginning on the date when such municipal employee was first appointed to the service and ending on December 31, 1921, *except any intervening period of time during which such municipal employee shall have been separated by resignation or discharge from the service*, shall be counted as a period of service for all the purposes of the act.

III.

The fact that the resignation of the employee was canceled, or the fact that a "leave of absence" should be substituted for his resignation instead of having his resignation canceled, does not in any way affect his status under the Municipal Employees' Annuity and Benefit Fund Act. Such cancellation or such substitution may affect his status so far as the Civil Service Board is concerned, but the Civil Service Board is a separate body from your Honorable Body, and its actions or records have no binding effect upon your Honorable Body excepting as may be provided in the Municipal Employees' Annuity and Benefit Fund Act.

Upon the facts as presented to me, I am of the opinion that a municipal employee of the City of Chicago who resigned before January 1, 1922, was out of the service of the City on December 31, 1921, and re-entered actual service after January 1, 1922, has only such rights as are provided for him in Sections 36 and 51 of the Municipal Employees' Annuity and Benefit Fund Act.

Yours respectfully,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Liability of City for Hospital Bills of Employees Injured in Discharge of Their Duties.

December 13, 1926.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

In your recent communication addressed to the Corporation Counsel, you state:

“In several instances police officers who have been injured in the discharge of their duties and who have tried to effect a settlement from persons responsible for such injuries, covering doctor bills and hospital bills, etc., have been informed by the Liability Companies that the City of Chicago should pay such bills for the reason that a police officer comes under the ‘Workmen’s Compensation Act.’ ”

You then request an opinion concerning the liability of the City to police officers under said act.

Section 5 of the Workmen’s Compensation Act, so far as it applies to the subject of our inquiry, provides:

“The term ‘employees’ as used in this act shall be construed to mean: First, every person in the service of the State, county, town, township, incorporated village or school district, body politic or municipal corporations therein, under appointment, or contract of hire, express or implied, oral or written, except any official of the State, or of any county, city, town, township, incorporated village, school district, body politic or municipal corporation therein.”

The foregoing section of the statute received the attention of our Supreme Court in the case of *City of Chicago v. Industrial Commission*, 291 Ill. 23, wherein a claim was made for and allowed by the arbitrator in the sum of \$3,500, payable in weekly installments of \$12 each for the death of a

police officer of the City of Chicago. Upon a review of the award the Industrial Commission made a finding that the deceased was an officer of the City and not an employee, and therefore not within the provisions of the Compensation Act, and reversed the decision of the arbitrator. The applicants sued out of the Circuit Court a writ of certiorari to review the decision of the Industrial Commission, and the court reversed the decision of the Commission and remanded the application to the Commission, with directions to enter an award in accordance with the finding of the court that the deceased was an employee and not an official of the City. The Commission made an award in accordance with the directions, and the City then sued out a writ of certiorari from the Circuit Court, and upon a hearing the award was confirmed and judgment rendered for \$3,500. The court certified that the cause was one proper to be reviewed by the Supreme Court, and the Supreme Court, in its opinion, at page 25, said:

“The deceased was a police patrolman *de jure*, regularly appointed and sworn as such. The city, by paragraphs 66 and 68 of section 1 of article 5 of the Incorporation act, had power to regulate the police of the city and pass and enforce all necessary police ordinances and to prescribe the duties and powers of a superintendent of police, policemen and watchmen. By an ordinance in force at and before the accident causing the death of Gilbert F. Coyne, a department of the municipal government was created known as the department of police, including a general superintendent, and patrolman, and offices were regularly and lawfully created. Various offices, including patrolmen, were to be known and designated as policemen and to constitute the police force of the city, and it was provided that the general superintendent of police should appoint all of the officers and members of the department.

Section 12 of article 6 of the Incorporation act provides that policemen shall be conservators of the peace * * *. Section 2 of division 6 of the Criminal Code makes it the duty of every policeman or other officer of any incorporated city, * * * having the power of sheriff or constable, when any criminal offense or breach of the peace is committed or attempted in his

presence, forthwith to apprehend the offender and bring him before some justice of the peace, to be dealt with according to law; to suppress all riots and all unlawful assemblies and to keep the peace, and without delay to serve and execute all warrants, writs, precepts or other process to him lawfully directed. These are all duties which can only be performed by officers, and they fix the status of a policeman as an official of the city or village in which he is appointed and sworn to perform such duties. Gilbert F. Coyne was an official of the city of Chicago, and by the terms of section 5 of the Workmen's Compensation act was excluded from its provisions."

And continuing, at page 27, the court said:

"The question what classes of persons shall be entitled to the benefits of the act is legislature, and if it should be deemed wise to include officers when performing duties beyond the scope of the usual duties of an officer, such a provision is for the General Assembly and not for the courts. The finding of the Industrial Commission that Gilbert F. Coyne was an official of the city and not an employee was correct."

By reason of the foregoing, I am of the opinion that there is no liability on the part of the City under the provisions of the Workmen's Compensation Act for the claim in question.

Respectfully submitted,

ROY S. GASKILL,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

**Jurisdiction of Board of Supervising Engineers as to
Certain Charges Under Traction Settlement
Ordinances.**

December 14, 1926.

HON. WALTER A. SHAW, Member, Board of Supervising Engineers.

Dear Sir:

We have your letter of December 7th in which you call to our attention certain items proposed to be charged under the settlement ordinances to the joint accounts of companies constituting the Chicago Surface Lines, and asking our opinion concerning the jurisdiction of the Board over the amounts of these charges until such time as the City, by written notice, may object to the same being charged to the said joint accounts. Section 19 of the ordinance of February 11, 1907, to the Chicago City Railway Company, which provides for the regulation of salaries of employees of the company and for the right of the City to object to unusual or excessive salaries or compensation, reads as follows:

“The Company may pay to the directors, officers, agents and attorneys of the Company as a part of the operating expenses, compensation for their services commensurate with the service actually rendered by them respectively, taking into consideration the compensation paid to directors, officers, agents and attorneys of other corporations or enterprises of similar magnitude and general character for like services, but the said City by written notice thereof may object to the payment thereafter of compensation in excess of an amount or rate specified in such objection to any such director, officer, agent or attorney, and in the event of a disagreement between the Company and the said City as to the proper amount to be paid as such compensation, the matter shall be submitted to the judgment of the said Board of Supervising Engineers whose decision shall be final and binding

upon the parties, except that, if either party shall be dissatisfied with such decision of said Board, then such dissatisfied party may make application to any court of competent jurisdiction to pass upon such objection and to determine the amount of the compensation or salary to be paid."

This section is identical with similar sections contained in the ordinances of February 11, 1907, March 30, 1908, and April 15, 1909, to the Chicago Railways Company, the Calumet and South Chicago Railway Company and the Southern Street Railway Company, respectively, and we concur in your view that it is the only section under authority of which the City may object to the amount of any salary or compensation paid by the companies to their directors, officers, agents or attorneys. In substance, that section provides that the company may pay compensation for services actually rendered commensurate with such services and with payments made for similar services by other companies of the size and character of the company herein. It then provides that the City may object to any unusual or excessive payment by written notice, and that thereafter the company shall not pay any salary or compensation greater than specified by the City in the notice, unless in the event of disagreement between the company and the City the amount to be paid shall be fixed by the Board of Supervising Engineers or by the courts upon appeal from that Board.

We are of the opinion that such language does not confer upon the Board, as a board, any general authority on its own motion to question or object to the amount of any such salary or compensation. The ordinance, however, does not specify by whom the City may file its written objection. Obviously, such written objection might be made by the City Council by resolution or order. We are further of the opinion that such notice might be filed by the Mayor or City Comptroller of the City. In event of disagreement between the City and the company after the filing of such notice, the Board of Supervising Engineers is to act initially as a board of arbitration, and for that reason it would appear that the member of the

Board representing the City should not file the written objection, but there appears to be no reason why such member should not take proper steps to notify the Mayor or City Comptroller of the City of any proposed payment of salary or compensation which he deems to be unusual or extraordinary, or to require investigation for the protection of the City's interest. Such member might further take steps to cause such amount not to be charged to the joint account until such officer of the City shall have had reasonable opportunity to consider the desirability of filing such notice or contesting for such salary or compensation so to be paid.

The Board is, however, required to determine from time to time what items of expenditure shall be charged to the capital account of the company, what items shall be charged to maintenance, repairs and renewals and generally what items shall be deemed proper charges to the operating expenses of the company. This implies of necessity the right of the Board, without antecedent objection by the City, to question the propriety of any charge or item of expenditure which by its nature is not an operating expense, or concerning which the Board has information which would prevent the charging of such item to operating expenses. It naturally follows that the Board is at all times entitled to require the company, when proposing to charge to the joint account any item of expenditure, to furnish to the Board such information and data as to the nature and purpose of such item as shall make the propriety of charging the same to the operating expenses determinable by the Board, and it would therefore be entirely proper for the Board to refuse to permit the charging of any such item where unaccompanied with sufficient information to inform the Board of the nature and purpose of such expenditure. This view, we think, is consonant with the accounting practice of the Board and the companies throughout the life of the ordinances.

In the light of these principles, we beg to submit the following analysis of the items suggested by your communication:

(1) The first item amounting to \$2,500 is stated to be for services rendered by West and Eckhart "in connection with traction matters." While this item is probably for services entirely legitimate, we are of the opinion that the information furnished is inadequate and that the Board should not permit such item to be charged to the joint account until further data concerning the nature and purpose of the services rendered has been furnished.

(2) The second item for the amount of \$15,000 payable to Winston, Strawn and Shaw is stated to be for legal services in and about the preparation of the Traction ordinance passed by the City Council on February 27, 1925, and submitted to the voters at the April election, 1925. We do not believe the character of the services stated is subject to any objection, but the amount charged is comparatively large and we believe the Board should request further itemization of such services in support of the right of the company to charge said item to the joint account.

(3) Item No. 3 is stated to be for a payment of \$15,000 to Harry P. Weber as a proportional amount of a balance for legal services in respect to a claim of the Federal Government against the Chicago City and Connecting Railways Collateral Trust and constituent companies for additional income taxes. In connection with this item, we respectfully call your attention to the fact that the City of Chicago and the Chicago City Railway Company and Chicago Railways Company are now in litigation concerning the propriety of charging income taxes paid by those companies to the joint accounts provided for in the settlement ordinances. Said litigation, consisting of two cases, to wit, *City of Chicago v. Chicago City Railway Company* and *City of Chicago v. Chicago Railways Company*, which have been consolidated, is now pending in the Appellate Court of Illinois, First District. It seems obvious that if the contention of the City shall be sustained that income taxes paid by street railway companies are not appropriate charges to the joint accounts, but relate to the so-called non-partnership expenses of the respective companies, the legal expenses incurred by such companies in litigating with the Federal Government the amount of such income taxes would not be a proper charge to the joint accounts as operating expenses of the companies under the settlement ordinances.

We, therefore, respectfully suggest that this item be held in suspense account and refused credit to the joint account until such time as litigation between the City and the companies concerning income taxes shall have been concluded. We also suggest, that inasmuch as this item is declared to be a proportional amount for legal services in representing the Chicago City Railway Company and the Calumet and South Chicago Railway Company, that there probably appears upon the books of the companies another item for such legal services by representatives of the Chicago Railways Company, and that such item (whatever the amount thereof may be) should also be held in suspense until the conclusion of the above mentioned litigation.

(4) Items Nos. 4, 5 and 6 for the sums of \$20,000, \$4,000 and \$4,000 respectively are stated to be charges proposed to be transferred from the sole or non-partnership accounts of the Chicago Railways Company to the joint account of that company for the payment of legal services rendered by Kirkland, Patterson and Fleming. No data or information is furnished as to the nature or purpose of such services. There is nothing from which the Board might determine whether such services were rendered for the benefit of the company in respect to the operation of its street railway as provided by the 1907 ordinance, or were rendered in respect to the sole and separate interests of said company and chargeable to its non-partnership affairs, while the fact that said amounts were originally charged by the company to its non-partnership accounts and are now proposed to be transferred to the joint account would of itself require explanation. We are of the opinion, therefore, that the Board should request additional information and itemization of the nature and character of such services before permitting said amounts to be charged to the joint account.

(5) Item No. 6 for the payment of \$12,245.06 to A. L. Drum & Company for services and expenses of engineers in connection with plans and estimates of cost on a proposed unified system of passenger transportation co-ordinating surface, elevated and subway lines, and Item No. 7, for the payment of \$4,503.50 to William J. Hagenah for expenses in connection with the completion of the reproduction cost appraisal of the properties of the Chicago Surface Lines, raises the same issue just

stated in connection with the payments for legal services by the firm of Kirkland, Paterson and Fleming. We do not suppose that any question will be made of the right of the companies to their engineering expense, in connection with plans for the improvement of its service, the expansion or consolidation of its properties or for the securing of information concerning the state of its properties at any given time, provided such expenses are so itemized that the nature and purpose thereof can be determined. We think, therefore, that the items mentioned should not be charged to the joint accounts unless and until supported by further data presented to the Board than is suggested by the items contained in your letter.

We are sending a copy of this letter to the City Comptroller with the request that he cooperate with you and with the Board in every way to determine the nature and the propriety of the amounts of the services suggested by the items which you have called to our attention.

Very truly yours,

C. M. DOTY,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Authority of Retirement Board as to Refunds from Pension Fund.

December 15, 1926.

RETIREMENT BOARD, MUNICIPAL EMPLOYEES' ANNUITY & BENEFIT FUND.

Dear Sir:

Complying with your request for an opinion as to the right of Mr. John B. Hittell, Chief Street Engineer, Board

of Local Improvements, to a refund of certain moneys paid in by him to the pension fund, the following is submitted:

Your letter states that Mr. Hittell resigned from the service of the City of Chicago on January 17, 1917; that on January 6, 1921, he applied for service pension under Section 7 of the Act of 1911, being at that time fifty-five years of age; that on a court order issued by the Circuit Court (B61302), on February 28, 1923, he was reinstated to his position, effective as of March 2, 1923; that he made up the payments into the fund to equal the \$600 required for twenty years of service and an additional \$30 as interest, at five per cent; that during the time he was on pension there was issued to him checks aggregating \$1,290.30, of which amount \$600 was held back pending the outcome of his suit; that he actually received \$690.30, which amount he subsequently returned to the treasury of the fund after his reinstatement to his position; that he is now a participant of the present fund and wants to know if he is entitled to receive a refund of the difference of what he had paid into the old fund at the time of his resignation or until he reached age fifty-five, and the \$630 that he made up the payments for. Your letter further states that up to the time of the amalgamation of the old and new funds, all that any employee could have paid in at the rates of \$2.00 and \$2.50 a month as required under the act was \$279. As I understand the matter presented to me, Mr. Hittell made certain payments into the pension fund for the purpose of qualifying himself to receive a pension; that he afterwards applied for and received that pension; that he subsequently decided to re-enter the service, and procured a court order reinstating him to his position in the service.

I do not find anything in the law authorizing or empowering your Honorable Body to refund any payments voluntarily made by Mr. Hittell into the pension fund under the circumstances.

Upon the facts as presented to me, I am of the opinion that Your Honorable Body has no power to make any re-

funds other than those specifically provided for in the Act of 1911 and the Act of 1921.

Respectfully submitted,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Salary of Police Officer as Basis for Pension.

December 15, 1926.

MR. DANIEL MECHTERSHEIMER, Secretary, Retirement Board
of the Policemen's Annuity and Benefit Fund.

Dear Sir:

Complying with your verbal request for an opinion *In re* question of salary to be used as basis for pension under Section 55 of the Policemen's Annuity and Benefit Fund Act, the following is submitted:

You stated that George J. Oakey, a member of the Police Department of the City of Chicago, had applied for a pension under Section 55 of the Act, based upon age and service; that Mr. Oakey was promoted by the Superintendent of Police from the rank of patrolman in the department to the rank of temporary sergeant by authority granted to the Superintendent of Police by the City Council; that said promotion was a reward for the performance of meritorious service by Mr. Oakey; that at the time of the promotion of Mr. Oakey, there were several vacancies in the rank of Sergeant of Police, but there was no eligible list of sergeants available under the Civil Service Act; that said promotion was for the period from June 13, 1925, to June 13, 1926; that said promotion to

the rank of temporary sergeant was approved by the Civil Service Commission; that said promotion was again renewed June 13, 1926, for the period of one year; that George J. Oakey has filed his resignation as a member of the Police Department and has filed an application with the Retirement Board for a pension as a "present employee" under Section 55 of the act. Your inquiry is as to what "salary" shall be used as a basis for his pension or annuity.

Section 55 of the Policemen's Annuity and Benefit Fund Act provides, among other things, that any "present employee" who shall resign or be discharged from the service after January 1, 1922, and after he shall have completed twenty or more years of service, and who shall be 50 or more years of age at the time of his resignation or discharge, and for whom the amount of annuity provided in the act shall be less than one-half of his salary, "shall have a right to receive annuity, from and after the date of such resignation or discharge, of an amount equal to 50 per cent of the salary of such present employee as such salary shall be at the time of his resignation or discharge from the service."

"Salary" as used in Section 55 of the act, necessarily means "legal salary," but not exceeding \$2,600 per year as the maximum amount of annual salary.

The questions presented in the case of Mr. Oakey upon the facts given me are, as to whether or not the salary paid to him as a temporary sergeant of police from and after June 13, 1925, was a "legal salary," and as to whether the salary of a temporary appointee should be used as the basis of a pension grant under Section 55 of the act.

The Civil Service Act, being "An Act to regulate the civil service in cities" approved March 20, 1895, has been adopted in the City of Chicago, and is now in force and effect in the City of Chicago and has so been in force and effect since its adoption. The Police Department of the City of Chicago is a classified service organized and conducted under and in accordance with the provisions of said Civil Service

Act, and the provisions of said act are binding upon the Police Department.

The Civil Service Act provides only one method of promotion in the classified service, namely, promotion by competitive examination under Section 9 of the Civil Service Act.

The Superintendent of Police has the power to fill by temporary appointment with the approval of the Civil Service Commission, vacancies occurring in the several ranks of the Police Department for a period not exceeding sixty days, and the salary attached to such rank when paid to such temporary appointee during such period of sixty days becomes and continues to be his legal salary so long as he continues to perform the duties of the rank to which he has been assigned by the head of the department, within the sixty day period.

I am of the opinion that when a policeman holds a promotional position after the first sixty day period without reappointment thereto pursuant to Section 10 of the Civil Service Act, he is so holding his position without warrant of law and his salary cannot be said to then be a legal salary. I am of the further opinion, upon the facts stated, that Mr. Oakey is not entitled to a pension based upon the salary of a sergeant of police unless he can establish the fact that at the time of his resignation he was holding the position of sergeant of police in conformity with the requirements of Section 10 of the Civil Service Act.

Yours truly,

LEON HORNSTEIN,

First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Instrument of Vacation Affecting Peoria Street, Between 115th and 116th Streets.

December 15, 1926.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We have your communication of December 13, 1926, requesting our opinion as to the validity of an instrument of vacation, recorded July 17, 1906, as Document No. 3895682, purporting to vacate certain lots, alleys, and particularly Peoria street between West 115th street and West 116th street.

You say that the Board of Local Improvements is spreading an assessment for paving West 115th street. You also say that the Northern Trust Company has been paying general taxes against the property covered by the purported vacation. Our opinion will affect the spreading of the assessment for the paving of 115th street as well as the street and alley returns in connection with the paving of 115th street.

At our request the Map Department has drawn for our use in connection with this opinion a pencil copy of that part of the Placerdale Subdivision lying north and east of the P. C. & St. P. R. R. right-of-way. On that map has also been indicated with red lines the lines of limitation of the submitted instrument of vacation.

The statute in effect at the time when this purported deed of vacation was spread of record is given in Hurd's Revised Statutes, 1913, page 1857, Chapter 109, Sections 6 and 7. From an examination of the plat it is plain that, in order to give legal effect to the purported instrument of vacation, the north and south alley in Block 1 would be made a *cul-de-sac*. This would greatly abridge and destroy the rights and privileges of the proprietors of the lots in the northeast corner

of said Block 1 and, consequently, as to that alley, said instrument of vacation is absolutely null and void and of no effect.

As to original Peoria street between 115th and 116th streets, let us say that its vacation would materially abridge and destroy the rights and privileges of the proprietors of the lots in Block 6 on Peoria street, lying immediately south of 116th street and would preclude their ready access to 115th street, which is a half section line, and, as indicated in your letter, is now to be paved. We would, therefore, be compelled to say that said instrument is null and void as to Peoria street between 115th and 116th streets.

We are herewith returning the copy of the instrument of vacation recorded July 17, 1906, as Document No. 3895682, submitted by you, and also the pencil copy of the map furnished by you at our request.

Very truly yours,

FRANK T. HUENING,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Transfer to Police Department of Land Purchased Out of Water Fund

December 16, 1926.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We are in receipt of your letter of recent date concerning the proposed transfer of a parcel of land purchased out of the proceeds of the water fund. The land in question is asked for by the Superintendent of Police for purposes of a

police station. Attached to your letter is a blueprint showing the location of the property, and letter addressed to you signed by the Superintendent of Police and a letter of the City Engineer also addressed to you.

It appears from the above that the land asked for is located on the north side of Lawrence avenue adjoining the Chicago & Northwestern Railroad. It also appears from the Engineer's letter that the property belongs to the water fund and that it was bought to permit the laying of water mains so as to avoid tunneling under the railroad embankment.

The question arises as to whether or not it is lawful to transfer this property to a general corporate purpose use. The proposed transfer can be made lawful provided the water fund is given credit for the value of the property. That is the only point that will have to be taken care of.

The City is bound by certain provisions of the charter of 1863 in the operation of its water system. Chapter 15 of that act contains many of these provisions relating to the maintenance, operation and revenues of the water system which are still in force. Not only does the Cities and Villages Act expressly keep in force all such provisions of the Charter of 1863 as amended in 1867 which are not in conflict with it, but practically the precise question was raised in the case of *People ex rel. City of Chicago v. Hummel, City Treasurer*, 215 Ill. 71. The question in that case related to the use of money, but the same principle is involved in respect to property that is not money but was purchased from the water fund and can again be converted into money.

Section 13 of Chapter 15 of the Act of 1863 says that

“all funds derived from the sale of said water loan bonds, or from water rents, or otherwise, for the water works of said city, shall be exclusively used and appropriated by said board, to the objects and purposes pertaining to the water supply of said city, herein specified, nor shall the same, or any part thereof, be used by the said board, or by the said city, for any other purpose.”

If the property in question is not required for water purposes or can be partly used, as in this case, by the City, it will not be necessary to go through the formality of selling it and purchasing it for the City, but some action of the City Council will have to be taken which will demonstrate that the water fund is not deprived of property that belongs to it. We suggest that an appraisalment by some person or committee that is familiar with values should be made, and a report made thereon to the City Council; and thereupon the City Council may pass an order directing that the property may be used for a police station upon the transfer of the amount of money fixed as the proper price from the general corporate fund to the water fund.

We return herewith the blueprint and the two letters addressed to you above referred to.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Status of Slip "B" and Salt Slip, Opening into South Branch.

December 16, 1926.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We have before us for reply, your communication of December 9, 1926, together with two letters of Mr. William F. Mulvihill, Superintendent of Waterways, *In re* the filling of Slip "B" and Salt Slip, which open into the South Branch

of the Chicago River. These letters are also accompanied by draft of letter recommended by the Harbor Master.

There is hardly a sufficient statement of facts in the papers submitted in regard to the origin, construction, use and occupation of the two slips to enable one to determine their private or public character. However, considering particularly the case of *Du Pont v. Miller*, 210 Ill. 140, we believe it entirely safe to assume the public has at least an easement of navigation in both by reason of their location and connection with the South Branch of the Chicago River.

(1) Legal phases:

These slips are in Harbor District No. 1 (Chicago Municipal Code of 1922, Section 1700). The City of Chicago variously, under its Charter of 1863, the Cities and Villages Act of 1872, and the Harbor Act of 1913, has authority to preserve harbors, to deepen, widen, dock, cover, wall, alter or change channel of water courses; to construct and keep in repair canals and slips for the accommodation of commerce; to erect and keep in repair public landing places, wharves, docks and levees; to regulate and control the use of such public and private landing places, etc.; to control and regulate anchorage, moorage, etc.; to make regulations in regard to the use of harbors, etc.; to acquire, own, construct and maintain harbors, etc.; (City Charter of 1863; Cities and Villages Act of 1872, Article V, Section 1, Subsections 30 and 39; Sec. 1 of Harbor Act of 1913; *City of Chicago v. C. B. & Q. R. R. Co.*, 319 Ill. 351, 358; Chicago Municipal Code of 1922, Sec. 1727). In speaking of canals and slips the court in *Du Pont v. Miller*, 310 Ill. 140, at page 149, said: "We have found no power granted to the city to close them and fill them up."

We construe this quoted statement to mean also that the City has no conclusive power of its own, exclusive of the power vested in the State Department of Purchases and Construction to grant permission to any person or corporation to close and fill up canals and slips. In other words, we feel constrained to advise that the City is without power or jurisdiction in the premises and that the same, subject to federal

jurisdiction and control, is vested in the State Department under the Rivers and Lakes Commission Act and other acts. And it would seem that the Superintendent of Waterways, before acting on these applications, is merely seeking an expression of the views or policy of the City.

(2) Observations *In re* river straightening:

On the question of differentiation of these two applications for the proposal to fill slips in connection with river straightening, we may say there is only one slip there concerned, namely, the Union Slip, a short distance north of 18th street. We have made inquiry and find (1) that exhibits attached to and made a part of the River Straightening Ordinance, passed by the City Council July 8, 1926, provide for a dock or retaining bulkhead which would close the portion of this slip lying west of the westerly line of the new channel, and (2) that the permit for this work granted by the Department of Purchases and Construction, authorizes the work to be done in accordance with the ordinance passed by the City Council and consequently includes the closing of the Union Slip in the manner above indicated. In view of the statutes authorizing river straightening, the ordinance, the permit and the determination thus far made by the public bodies and officials to relocate the river channel, we do not believe it could be competently urged that the City would be assuming inconsistent positions if it should advise against filling the two said slips.

(3) Observations as to policy:

It may well be pointed out that the site of Salt Slip has been mentioned as a possible location for a barge line terminal, that at the present time the Commercial Club is working upon a comprehensive Harbor Plan for the City and that these slips may or may not enter into such plan.

Unless there is some very especial reason for opposing the filling of these slips, we suggest that the Superintendent of Waterways be advised that the City would be disposed to follow whatever course the State Department may determine to pursue in regard to these two applications.

We return herewith the two letters of the Superintendent of Waterways, each dated November 19, 1926, and the draft of letter of the Harbor Master.

Very truly yours,

FRANCIS X. BUSCH,

Corporation Counsel.

JAMES G. SKINNER,

Special Assistant Corporation Counsel.

Alteration of Dry Cleaning Plant.

December 18, 1926.

MR. JOHN PLANT, Chief Fire Prevention Engineer.

Dear Sir:

This will acknowledge the receipt of your letters of November 24th and December 11th requesting our views regarding application made to you to approve plans for alterations to be made in a dry cleaning establishment at 4242-4244 Cottage Grove avenue.

We understand from your communication that this dry cleaning establishment was in existence prior to 1912; that the proposed alterations provide for the removal of the present second story over certain of the rooms and additions in some places but that when the alterations are completed the cubical contents of the structure will be less than it is at the present time; that rooms five and six shown on the plans will, when altered, comply with all the provisions of the new dry cleaning ordinance except the 25 feet clearance provision thereof.

Messrs. Sailor & Hoffman, the architects, have called at this department and presented to us their ideas concerning the proposed alterations.

"The nature of the proposed work," they state, "consists of removing certain parts and altering and improving an old and existing two-story building of common or combustible construction, reducing the cubical contents and making the new construction practically fireproof and less of a fire hazard. * * * The existing condition of the present building is very poor and in need of repairs and is comparatively a much greater fire hazard than the altered condition will be as we propose to tear down the rear portion of the second story, removing the old wood roof and second floor and to build a fireproof roof over the resulting one-story rear portion and to reinforce the old brick walls with steel work."

The architects also advise that as a result of the alterations the cubical contents of the existing dry cleaning establishment will be reduced 2830 cubic feet and that these premises have been operated as a dry cleaning establishment since 1907.

The question presented is whether you should approve the plans for the alterations even though they do not show compliance with the 25 feet clearance provision of the dry cleaning ordinance.

Paragraph (f) of the new dry cleaning ordinance of May 26, 1926, differs from the old dry cleaning ordinance in that the new ordinance expressly permits buildings in which a dry cleaning business was carried on prior to July 22, 1912, "to be altered or rebuilt," without compliance with the 25 feet clearance provision, and reads as follows:

"(f) Every such building shall be detached and at least twenty-five feet from any other building or structure or to the line of adjoining property which may be built upon; provided, however, that the use of any building in which a dry cleaning business was carried on prior to July 22, 1912, may be continued where such building is separated from all other buildings by a fire wall, with no opening into any adjoining building; *and further provided, that such buildings shall be permitted to be altered or rebuilt if all the regular building requirements are complied with,* and provided, further, that any building used for dry cleaning purposes but not so occupied or

used for such purposes for a period of three consecutive months shall not again be used for the business of dry cleaning unless all requirements governing new buildings or dry cleaning plants have been complied with."

To "alter" as applied to buildings means a change or substitution in a substantial particular in one part of a building for a building different in that particular; a change or changes within the superficial limits of an existing structure (2 Corp. Juris, page 1156). To "rebuild" means to build or build up again; build or construct after having been demolished; reconstruct or reconstitute; as, to rebuild a house (Century Dictionary).

The City Council in using the above language had in mind, we think, the fact that there are in Chicago some dry cleaning plants established before the enactment of the fire prevention ordinance of July 22, 1912, which, because of their antiquated construction, surroundings or methods, may be very dangerous at the present time from the standpoint of explosion or fire. It recognized that situations might arise because of changes in processes, new methods of operation, new buildings or otherwise in which it would make for better fire prevention and reduce the fire hazard to permit dry cleaning establishments in existence before July 22, 1912, to be altered or rebuilt, provided they complied with the regular building requirements and without requiring their compliance with the 25 feet clearance provision. And it was to take care of these cases that the City Council inserted in the dry cleaning ordinance of May 26, 1926, the new provision that "such buildings may be permitted to be altered or rebuilt if all the regular building requirements are complied with." (See Opinions No. 1257 and 1676, September 7, 1926, and October 15, 1926).

Inasmuch, therefore, as a dry cleaning business was carried on in the building in question prior to July 22, 1912, we think you should approve the plans covering the proposed alterations without requiring compliance with the 25 feet clearance provision so long as the regular building require-

ments are complied with, and especially do we so advise you in this case as it will mean, according to our understanding, a substitution of improved construction in conformity with the present building requirements in places of obsolete construction and a reduction in the cubical contents of the structure.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Location of Garage Near Private School.

December 21, 1926.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

This will acknowledge receipt of your letter of December 17th enclosing communication from Leonard E. Steele, Esq., relative to application for permit to erect a public garage on the southeast corner of Cottage Grove avenue and 49th street. The proposed garage is diagonally across Cottage Grove avenue from the grounds of Saint Francis Xavier Academy, being 122 feet to the nearest point of the grounds thereof, though more than 500 feet from the nearest point of the school building.

The ordinances prohibit the construction of a public garage "within 200 feet of any hospital, church or public or parochial school or the grounds thereof."

You wish to be advised whether the Saint Francis Xavier Academy is a public or parochial school within the meaning of the above ordinance.

Saint Francis Xavier Academy, it appears, is conducted by the Sisters of Mercy. Its corporate titles are The Saint Francis Xavier Female Academy of Chicago, Illinois; The Saint Francis Xavier College for Women, Chicago, Illinois. It has a preparatory school and a secondary school. There are also especial departments of art, music and expression. Regular tuition fees are charged.

“The spacious five-acre lawn, Xavier Park, affords facilities,” the catalogue states, “for outdoor sports and exercise. It extends from Cottage Grove avenue on the east to Langley avenue on the west. 49th street is the northern boundary and 50th street the southern. As religious instruction is the chief factor in Christian education, Catholic children are carefully trained in the truth of their holy faith and in their religious duties. Non-Catholic girls are admitted as pupils and no undue influence is exercised over their religious convictions, but, for the sake of order, all are required to conform to the external discipline of the institution.”

The school does not belong to, is not connected with, under the jurisdiction of, nor maintained by any particular Catholic parish in the City of Chicago.

In several previous opinions we have gone fully into the question of the meaning of what is a public school and what is a parochial school within the terms of the above ordinance, and for that reason we will not go into the matter at length herein.

A public school within the meaning of the ordinance is an institution which is supported in whole or in part by public taxation. A parochial school must be construed as one coming under the territorial limits of a parish of some religious sect which exercises ecclesiastical jurisdiction over the people of that faith therein and provides schools within the same. See Opinions of this department, 1912, page 884, concerning the Illinois Industrial School for Colored Girls conducted by the Sisters of the Good Shepherd and a training school for home, foreign and city missions; Opinion of April 12, 1926, con-

cerning the North Park College; Opinion of July 7, 1926, concerning the Immaculata High School.

The Saint Xavier Academy is not supported in whole or in part by public taxation and is therefore not a public school. It does not belong to any parish, neither is it owned or controlled by any parish nor under the territorial limits of any parish which exercises ecclesiastical jurisdiction over the people therein and provides schools within the same.

Ordinances in derogation of property rights must be strictly construed. It does not appear to us from the description of the Saint Francis Xavier Academy as contained in its catalogue that it is within the purview of the above ordinance.

We are constrained to advise you that the Saint Francis Xavier Academy, in so far as appears from its catalogue or as we are advised in the premises, is not a public or a parochial school within the purview of the above ordinance and a permit to construct the proposed garage should not be denied because of its proximity to the said Saint Xavier Academy.

Very truly yours,

WILLIAM L. SULLIVAN,

Approved: *Assistant Corporation Counsel*

FRANCIS X. BUSCH,
Corporation Counsel.

Ordinary Disability Rights of Beneficiary Who Missed Payments into Fund.

December 22, 1926.

THE RETIREMENT BOARD, MUNICIPAL EMPLOYEES' ANNUITY
& BENEFIT FUND.

Gentlemen:

Replying to your request for an opinion as to ordinary disability benefit rights of a beneficiary who has failed to

make payments into the ordinary disability fund, the following is submitted:

Your letter states that Joseph Tyk, a motor truck driver, became disabled October 15, 1926; that Mr. Tyk missed making payment of ordinary disability benefit protection into the fund for the first semi-annual period of 1925, but had been deducted from on the payrolls for subsequent ordinary disability benefit contributions; that Mr. Tyk's civil service record shows that he was laid off December 26, 1924, and reinstated December 16, 1925; that Mr. Tyk died November 11, 1926. Your Honorable Body has heretofore adopted a policy that where deductions were not made from salary for ordinary disability benefit contribution because the beneficiary's name did not appear on the payroll, and later deductions were made for ordinary disability benefit contributions when said beneficiary's name did appear on the payroll, such later deductions would be construed as a waiver of the penalty of suspension for failure to make prior contribution, upon the beneficiary paying such prior contributions into the ordinary disability benefit fund, where such failure to make contribution occurred prior to May 1, 1926.

In accordance with this policy, ordinary disability benefits should be allowed for the period of time during which Mr. Tyk would otherwise have been entitled to such benefits if such failure to make contribution had not occurred, it being understood that the missing payments will be made into the fund or deducted from the disability benefit so allowed.

Yours very truly,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Right of One Who Has Resigned to Restoration to His Former Civil Service Position.

December 27, 1926.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

We are replying to your request of the 21st inst. for an opinion as to the "right to be restored to the active force" in their former positions, of men who have long since retired from the civil service upon tendering their written resignations, and who in each instance failed to comply with the rule of the Civil Service Commission for the withdrawal of such resignation "within thirty days after the filing of same."

There are three reasons why such restoration cannot legally be made:

First, it would be a violation of the letter of Section 2, Rule 9, of the Civil Service Commission, which reads as follows:

"Sec. 2. *Resignation.* A copy of the resignation of an officer or employe from the classified service shall be filed with the Commission by the head of the department receiving and accepting the same. The Commission may permit the withdrawal of a resignation and its cancellation upon application at any time within thirty days after the filing of the same, provided, the head of the department concerned approves of such withdrawal and cancellation."

This rule is of long standing, and is fully authorized by Section 4 of the Civil Service Act, which empowers the Civil Service Commission to adopt such rule to carry out the purposes of the act in the matter of "removals" in accordance with its provisions.

Furthermore, Sections 13 and 30 of the act expressly recognize *resignation* as a means of terminating one's status

in the civil service. Section 13 provides that the appointing power shall immediately report "all transfers, promotions, *resignations* or vacancies from any cause in such service." Section 30 provides that "the Commission shall certify to the Comptroller or other auditing officers all appointments to offices and places in the classified civil service and all vacancies occurring therein whether by dismissal, or *resignation*, or death."

The second reason is that by the terms of the Civil Service Act such a *resignation* creates a vacancy in the civil service which must be filled by the certification and the appointment of another from an eligible list of persons who have qualified therefor by original or promotional examinations for such positions. *Roderick v. City of Chicago*, 283 Ill. 462. And, since this is the method provided by the Civil Service Act for the filling of all vacancies occurring in the civil service, this method excludes all others. Therefore, one would not be eligible to such certification and appointment who has thus resigned.

The third reason which precludes this restoration of one who has thus resigned from the civil service is that he is guilty of *laches* for failure to comply with such Section 2, Rule 9, of the Civil Service Commission, for the same reason that the courts have held that the actions of *certiorari* and *mandamus* are barred to a discharged civil service employee who has failed to bring such actions within a period of six months after his discharge. As said by the Appellate Court of Illinois in the recent case of *Cox v. Finn*, Vol. 239, Ill. App. 670, "(Petitioner) waited over a year after her discharge, during which time the position may have been filled and the salary paid to another. Such a consideration was deemed pertinent in determining whether a writ of error was prosecuted with diligence in *People v. Burdette*, 285 Ill. 48, where the petitioner was held guilty of *laches* in not filing his petition within six months after his discharge."

For the reasons assigned we do not believe that one can be restored to his former civil service position who has form-

ally resigned therefrom, and who has not within thirty days from the time of tendering such *resignation* withdrawn the same in the manner provided by said rule of the Civil Service Commission.

Yours very truly,

FRANCIS J. VURPILLAT,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Eligible List for City Engineer.

December 27, 1926.

HON. A. A. SPRAGUE, Commissioner of Public Works.

My dear Colonel:

On December 20th you called attention to the fact that the name of Mr. Alex Murdoch appears on the eligible civil service list for engineers and requested consideration by this department of the propriety of this name being upon the list.

I have gone into this matter rather fully.

On May 22, 1923, I rendered an opinion to Hon. Nicholas R. Finn, President of the Civil Service Commission, (published opinions of the Corporation Counsel 1923-1924, page 173) advising him as to the duty of the Civil Service Commission in connection with a demand served upon him by Mr. John Ericson for reinstatement to the position of Chief Engineer. In that opinion I held that Mr. Ericson had been appointed City Engineer in accordance with the terms of the Civil Service law on April 1, 1898; that he had never resigned or voluntarily vacated that position and that no charges had ever been preferred against him, but that from April 30, 1919, Mr. Ericson had been prevented from performing the

duties of City Engineer and had performed other duties for the City of Chicago, being carried on the municipal payroll as Consulting Engineer to the Commissioner of Public Works.

I further held that no such position as Consulting Engineer to the Commissioner of Public Works had ever been legally created and in contemplation of law there was no such office, position or place of employment in such classified civil service. I further held that the attempted certification of Alex Murdoch to the position of City Engineer was illegal and void because no vacancy existed in that position, and advised the Civil Service Commission to henceforth recognize Mr. John Ericson as City Engineer of the City of Chicago and restore the name of Alex Murdoch to the civil service list of eligibles for appointment to the position of City Engineer provided such a list then existed.

At that time, there was not brought to the attention of the Law Department any of the facts connected with the civil service examination alleged to have been taken by Mr. Murdoch and we assumed that having been certified from an eligible list that a lawful civil service examination had previously been held. Upon investigation of the facts connected with the examination taken by Mr. Murdoch I now find that the examination was an original entrance examination. There is no question under the law as laid down in the case of *People ex rel. Williams v. Errant et al.*, 229 Ill., page 56, and in the more recent cases of *People ex rel. Schultz v. N. R. Finn et al.*, Appellate Ct. No. 30885, and *Cederwall v. Finn et al.*, Appellate Ct. No. 30884, that this examination was required by the law to have been a promotional rather than an original entrance examination and that the original entrance examination was contrary to law and all proceedings in connection therewith void.

Even if the original examination taken by Mr. Alex Murdoch had been conducted in accordance with the Civil Service Law, having been illegally certified, his only civil service rights would be to a place upon an eligible register and the Civil Service Commission by virtue of Section 10 of the Civil Serv-

ice Law would have the legal right to strike his name or the name of any other candidate from such eligible register after such name or names had remained on said register for more than two years.

You are, therefore, advised that the eligible list for City Engineer, created as the result of the original entrance examination heretofore referred to is null and void and should be cancelled by the Civil Service Commission.

I have forwarded a copy of this opinion to the president of the Civil Service Commission in order that action may be taken consistent therewith. A copy of my letter to the Commission is also enclosed for your information.

Very truly yours,

FRANCIS X. BUSCH,
Corporation Counsel.

Capacity of Tanks Permissible in Private Garages.

December 28, 1926.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

This department is in receipt of a communication from William English, lawyer, 105 West Monroe street, who is attorney for the Brinks Express Company. Brinks Express Company, as we understand it, have made a contract with one George S. Kuhter whereby Mr. Kuhter has agreed to construct a garage at 1036-1044 West Harrison street and rent the same to Brinks Express Company for a long term of years. Frontage consents were obtained for the erection of a garage and a permit to construct it has been issued by the Commissioner of Buildings, the garage being now under construction. It is a one-story building 100 x 150 feet.

The Brinks Express Company is now desirous of installing underground within said building two 1,000-gallon tanks to contain gasoline; one at the front and the other at the rear of said building. The tanks are to be used only in connection with the cars of the Brinks Express Company which will be the only cars in the garage.

The question arises whether it will be necessary for the Brinks Express Company to secure frontage consents for the installation of said tanks under Section 2279 of The Chicago Municipal Code of 1922, which provides that "it shall be unlawful to install any tank or tanks for the storage of any of the liquids mentioned in Section 2277 in any lot or plot of ground without first obtaining the written consents of the property owners representing the majority of the total frontage in feet of any lot or plot of ground lying wholly or in part within lines 150 feet distant from and parallel to the boundaries of the lot or plot of ground upon which said tank or tanks is or are to be installed; * * * These provisions shall not be applicable to the installation of a tank or tanks containing any of the oils referred to in Section 2277 when such oils are to be used in connection with garages or manufacturing plants where such oils are incidental to the business conducted or oils used for fuel purposes. * * *."

This department has heretofore held that whenever a public garage desires to install tanks to store more than 1065 gallons of gasoline, it should be required to procure frontage consents under said Section 2279 (See Opinion No. 933 of Assistant Corporation Counsel Veeder, April 21, 1925).

We also have held that garages maintained by public carriers like taxicab companies, cartage companies, express companies, etc., come within the definition of a "public garage" as given in The Chicago Municipal Code of 1922 (See Opinion of Assistant Corporation Counsel Hornstein of April 14, 1924).

The point which is made by Mr. English in his communications and conferences with this department is that the garage of the Brinks Express Company is not a public garage.

The charter powers of Brinks Express Company, it being an Illinois corporation, are, he writes, as follows:

“To perform all of the following services for compensation for other persons, firms or corporations with whom or which this corporation may specially contract, exclusively by separate, individual contracts with each such person, firm or corporation, and not in any way as a common carrier, nor as rendering or offering to render service to the public, to wit: to receive checks from such other persons, firms or corporations, to cash the same at the banks on which they are drawn, to make up pay-rolls for such other persons, firms or corporations out of said moneys so received, or other moneys, to carry such pay-rolls, or other moneys or securities, and to guard and protect the same, for such persons, firms or corporations, and to attend to the paying of the employees of such other persons, firms or corporations, and to handle the clearings for banks and sell tickets and handle the proceeds for conventions, exhibitions and performances; all said business to be carried on in Chicago, Illinois, or elsewhere in the United States of America or any foreign country in which this corporation is properly admitted to transact its business.”

You will note from the above that the charter of the Brinks Express Company specifically states that it is not a common carrier and it would seem to us that the automobiles which it uses are incidental to its business and are not, in so far as we are advised in the matter, automobiles which are “stored or housed for hire” within the meaning of the public garage ordinance. We think there is very grave doubt that the garage in question is a public garage, and that, therefore, the permit to install two 1,000-gallon underground tanks in said building, one tank at the front and one tank at the rear thereof, should be granted without requiring frontage consents under Section 2279, the said tanks to comply as to the safety thereof with all the ordinances of the City.

As there are a great many factors to be taken into consideration concerning the question of whether a certain garage is public or private and as each case depends upon its own

particular facts, we do not wish to be understood in this communication to be passing upon any other case than the one now discussed, to wit, the private garage to be used by the Brinks Express Company at 1036-1044 West Harrison street and the two 1,000-gallon underground tanks to be installed therein.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Enforcement of Diphtheria Carrier Quarantine.

December 28, 1926.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

Your letter to which was attached a copy of a letter from Dr. Herman N. Bundesen in reference to Mrs. Agnes Hasen-burg, diphtheria carrier, and your request for an opinion as to how far your department could proceed in this matter, has been referred to the undersigned.

It appears the Commissioner of Health has asked you to enforce a diphtheria carrier quarantine. It is his wish to have a police officer stationed at Mrs. Hasenberg's home to prevent her from leaving the house, and to exclude parties, other than members of her family, from entering the house.

The Corporation Counsel is of the opinion that the health authorities are justified in adopting the above measures if in their discretion, they regard such action as necessary to prevent the spread of the disease, even though the courts have sometimes interfered in cases of this kind.

One of the first duties of the municipality is to guard the health of its people, and any act done in furtherance of this duty, if it can be shown that it tends to lessen the danger of the spread of disease and is done in the method prescribed by law, is within the power of the City.

It is clear, the isolation of persons liable to spread disease is within the police power of the State, and that this power may be delegated to a legally constituted Board of Health. This power cannot be delegated to an individual. Thus the Health Commissioner of Chicago is purely a ministerial officer and has no legislative powers. The City has no right to give him authority to make rules and regulations which shall have the effect of law. His authority is limited to carrying into execution proper orders of a legally constituted Board of Health. (*The People ex rel. Barmore v. Robertson et al.*, 302 Ill. 422, 436.)

The exercise of the police power is a matter resting in the discretion of the Legislature or the Board to which the power is delegated, and the courts will not interfere with the exercise of this power except where the regulations adopted for the protection of the public health are arbitrary, oppressive and unreasonable (*People v. Weiner*, 271 Ill. 74).

In the *Barmore* case, *supra*, where a typhoid carrier was required to remain in her home and visitors were excluded, the court held it was not necessary that one be actually sick in order that the health authorities would have the right to restrain one of his liberties by quarantine regulations. The court states, pages 433, 434: "Effective quarantine must therefore be not so much the isolation of the person who is sick or affected with the disease as a prevention of the communication of the disease germs from the sick to the well * * * Quarantine, in the very nature of the regulation, is not a definite or uniform measure but it must vary according to the subject. One of the important elements in the administration of health and quarantine regulations is a full measure of common sense." And in the *Tait* case, 261 Ill., pages 197, 204, where a case of scarlet fever was involved, the court says:

“If it were affirmatively shown that *a single case* of scarlet fever or other dangerous and communicable disease existed in the house, we think that that would be sufficient to call the powers of the Board into action.”

It is evident the proper health authorities, acting in the manner prescribed by law, may quarantine Mrs. Hasenberg. And it would seem that the stationing of a guard in the vicinity of the home to prevent the egress of Mrs. Hasenberg, and to prevent the entry of other parties into her home, would be a reasonable measure in making the quarantine effective.

There may be peculiar circumstances connected with this case which would render the isolation harsh or oppressive. The law as given above will apply in a case of this kind, but the courts will scrutinize the acts of the health authorities and the acts of those carrying out their instructions, and protect the individual where the circumstances of the case or the condition of the patient does not warrant the taking of such extreme measures.

It would appear, from Dr. Bundesen's letter, that the legally authorized health authorities have found Mrs. Hasenberg is afflicted with a dangerous and communicable disease; that these authorities have decided it is necessary to isolate Mrs. Hasenberg, and in pursuance of their decision have instructed the Health Commissioner to quarantine the patient in her home. On the basis of the facts as thus presented by Dr. Bundesen, you may carry out his instructions in reference to the enforcement of the quarantine.

Yours very truly,

EDWARD M. QUINN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Seniority in Case of Lay-Off.

December 29, 1926.

HON. NICHOLAS R. FINN, President, Civil Service Commission.

Dear Sir:

We have your communication of the 27th instant, in which you request an opinion in the matter of "the proposed lay-off of one Senior Clerk." You enclose a letter of the 23d instant from Fire Commissioner Joseph F. Connery, addressed to the Commission, in which the proposal is thus stated:

"In the Appropriation Ordinance of 1926 there appear, among others, the following items:

51 A Senior Clerk.....	\$2,300
51 A-7 Senior Clerk	2,300
51 A-16 Senior Clerk	2,300

These positions are held by Anthony J. Corcoran, William J. Morahan and Mary C. McCauley, respectively.

It is the desire of the writer to eliminate the position under Account 51-A-16 for the ensuing year, and to remove from the payroll the incumbent, Miss McCauley, as of December 31, 1926. The question of seniority in service having arisen, will you kindly advise me of the procedure to follow to carry out the above intent."

In your own communication you state that:

"The three senior clerks whose names are mentioned in Mr. Connery's note, their places of employment, and dates of certification are as follows, viz: Anthony Corcoran (employed in Fire Commissioner's Office), certified January 1, 1922; William J. Morahan (employed in Fire Shops), certified October 17, 1921; Mary McCauley (employed in the Fire Prevention Bureau), certified December 23, 1920."

You express doubt as to whether Mary McCauley may be laid off as proposed by the Fire Commissioner because she

"has greater seniority than the other two mentioned clerks," and you ask whether "the fact that in the request for certification the head of a department can specify whether a man or woman clerk is required (would) make any difference, once certification is made." The Fire Commissioner requests that "you kindly advise (him) of the procedure to follow to carry out the above intent."

The City Council alone has the power to abolish a position in the civil service. The Civil Service Commission alone has the power to discharge one from the civil service. The provision in Section 12 of the Civil Service Act that

"Nothing in this act shall limit the power of any officer to suspend a subordinate for a reasonable period not exceeding thirty days"

does not warrant the discharge or suspension of a subordinate arbitrarily or merely at the will of the superior. It has been held by the Supreme Court that the power to suspend, which is here recognized, can be exercised only for cause actually existing at the time, such as enumerated in such Section 12, to enable "the head of a department to maintain the necessary discipline and efficient service," and "for lack of work, lack of funds or other good cause," and to sustain such lay-off the record must disclose "that the action of the head of the department was taken in good faith and in the interest of economy and necessary retrenchment and with no intent to circumvent or evade any provision of the Civil Service Law.

Thomas v. City of Chicago, 273 Ill. 479.

Fitzsimmons v. O'Neil, 214 Ill. 494.

We believe that the report of the head of a department to the Civil Service Commission of any proposed lay-off should fully and clearly state the cause therefor.

Assuming that there exists cause for the proposed lay-off of one senior clerk, we now consider whether the Fire Commissioner may "remove from the payroll" the "incumbent, Miss McCauley, as of December 31, 1926." The Fire Commissioner expresses the desire to eliminate for the ensuing

year the position held by Miss McCauley. This in itself furnishes no good cause for the proposed lay-off. If any lay-off may be made it must be in accordance with Section 1, Rule IX of the Civil Service Commission, viz :

“Rule IX. Section 1. *Lay-Offs.* Whenever it becomes necessary, through lack of work or funds, or for other cause, to reduce the force in any employment, the person who was last certified to such employment shall be the first laid off. Employment in such cases of lay-off shall mean a force under one general head, and the Commission shall determine the facts relating thereto. Persons laid off in accordance with the foregoing procedure shall be entitled to have their names placed at the head of a reinstatement list, according to the seniority of their certifications.”

It appears from your letter and also that of the Fire Commissioner that the proposed lay-off affects three Senior Clerks in the Fire Department, whose names, places of employment and dates of certification are as follows :

Anthony Corcoran, Fire Commissioner's Office, certified January 1, 1922;

William J. Morahan, Fire Shops, certified October 17, 1921;

Mary McCauley, Fire Prevention Bureau, certified December 23, 1920.

If, as “the Commission shall determine the facts relating thereto,” these three positions must be considered in “a force under one general head,” it is quite clear that any lay-off as proposed in this case must be “*the person who was last certified to such employment.*” The proposed lay-off of Miss McCauley, under the facts as stated, would therefore be in violation of the explicit language of the foregoing rule.

Nor do we think the situation is affected by the following provision of Section 10 of the Civil Service Act, viz : “In making such certification sex shall be disregarded except when some statute, the rules of said Commission or the appointing power specified sex.” This provision applies only

to *certification* for appointment, which is the sole and specific subject-matter of the provision and also of the section itself. Furthermore, Section 1 of Rule IX above quoted makes no distinction in sex in providing who shall be laid off where cause exists.

We believe the foregoing opinion fully meets your inquiry and also the request of the Fire Commissioner.

Yours truly,

FRANCIS J. VURPILLAT,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Pension Rights of Minor Child of a Policeman's
Widow Who Was Granted a Pension Under the
Act of 1887 as Amended.**

January 2, 1927.

RETIREMENT BOARD, POLICEMEN'S ANNUITY & BENEFIT FUND.

Gentlemen:

Replying to your request for an opinion relative to the pension rights of a minor child of a policeman whose widow was granted a pension under the Act of 1887 as amended, the following is submitted:

Your letter states that Gustav Engel was a policeman, who died March 29, 1913, while an active member of the department; that he held the rank of sergeant at the time of his death; that his annual compensation was \$1,500; that he rendered a total service of twenty-two years, three months and ten days; that on May 27, 1913, Eliza Engel, widow of Gustav Engel, was awarded a pension of \$62.50 a month, dating from

March 30, 1913; that Eliza Engel continued in receipt of this pension until she died; that Eliza Engel died November 23, 1926; that Eliza Engel left her surviving one daughter, Loraine L. Engel, who will be eighteen years of age on September 16, 1927.

Your question is as to what are the rights of Loraine L. Engel to a pension, if any. At the time of the death of Gustav Engel there was in force and effect in the City of Chicago, a Police Pension Act of 1887 as amended in 1911. Section 6 of said act as amended, provided, among other things, as follows:

“Whenever any policeman shall die after ten years’ service and while still in the service of such city, village or town as a policeman, leaving a widow or child or children under the age of sixteen years, then upon satisfactory proof of such facts made to it, said Board shall order and direct that a pension of one-half the salary, not exceeding the sum of \$900.00, shall be paid to such widow, or if there be no widow, then to such child or children until they shall be sixteen years of age, said pension to cease upon marriage, as provided above.”

In 1915, a new Police Pension Fund Act was enacted containing in said Section 5 thereof substantially the same provision for pension to widow or minor child, and providing in Section 12 thereof that persons entitled to or receiving pensions under the Act of 1887 as amended, should continue to be paid out of the Police Pension Fund created under the Act of 1915, but that neither the pension granted under the Act of 1887 as amended nor the amount thereof paid in any wise be affected.

In 1917 the Police Pension Fund Act of 1915 was amended to provide that after the death of any policeman who had served for a period of twenty years or more there should be paid to his widow a pension of \$50 per month and an additional sum of \$10 per month for each of his children under eighteen years of age, and that should there be no widow or should the widow die before his children arrive at the age of eighteen years, then each child should re-

ceive while regularly attending school, the sum of \$15 per month. The Amendatory Act of 1917 also contained the following provision, in Section 6 thereof:

“This Amendatory Act shall not be taken, deemed or construed as retroactive and neither the pensions granted under the Act to which this is an amendment nor the amounts thereof shall in any wise be affected, except as is specifically provided for in this Amendatory Act.”

The right of a minor child to a pension as conferred under the Act of 1887 as amended, was preserved by a similar and specific provision in the Act of 1915. This right to a pension on the part of a minor child was not affected by the amendment of the Act of 1917 other than as the period of time during which the child should be paid a pension was extended from sixteen years to eighteen years and the amount decreased from the amount of the mother's pension to the sum of \$15 per month, payable only in the event that such child was regularly attending school. Section 50 of the present Policemen's Annuity and Benefit Fund Act provides that all annuities, pensions and other benefits allowed prior to January 1, 1922, shall be paid by your Honorable Body from the present fund “according to the law or laws under which such annuities, pensions or other benefits were allowed.” The same section also provides for the granting of claims pending or ungranted on January 1, 1922. The same section also provides for the payment of a pension to widows and children less than eighteen years of age of policemen who are or shall become pensioners under the Act of 1915. There is no provision, however, in the present act relative to the right to a pension for a minor child of a policeman whose widow was receiving a pension under the Act of 1915, as such child had only an expectancy and not a vested right, and Section 5 deals only with vested rights and with the rights of widows and children of policemen who were then or should become pensioners under the Act of 1915. It would, therefore, appear that any right to a pension on the part of Loraine L. Engel would enure to her under the Act of 1915 as amended

in 1917. The Act of 1915 as amended not having been specifically repealed by the Policemen's Annuity and Benefit Fund Act of 1921, but having, as a matter of fact, been actually amended and therefore recognized as still in force and effect at the very same session of the Legislature at which the Policemen's Annuity and Benefit Fund Act was enacted.

I am of the opinion that Loraine L. Engel is entitled to be paid a pension from the date of the death of her mother and until she attains the age of eighteen years, in the sum of \$15 per month while she is regularly attending school, in accordance with the provisions of Section 3 of the Amendatory Act of 1917, amending the Police Pension Fund Act of 1915.

Very truly yours,

GEORGE F. MULLIGAN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Rights of Owner of Projecting Sign.

January 3, 1927.

HON. WILLIAM E. DEVER, MAYOR.

Dear Sir:

You referred to this office a file of correspondence relating to a sign projecting over the sidewalk at 2644 West North avenue. This seems to be objectionable to the Businessmen's Association of that street, and the Alderman of the 35th Ward also voices a complaint. The question therefore arises as to the respective rights of the owner thereof and the City. The sign was erected under a permit dated November 18, 1926. Such permits are authorized under Section 1644, 1645 and 1646 of The Chicago Municipal Code of 1922, as amended

on January 30, 1925 (Council Journal, pages 4693 and 4). From the report of the Chief Electrical Inspector it would seem that this is a standard sign and within the requirements of the ordinance. Section 1645 makes it mandatory upon the Commissioner of Gas and Electricity to issue a permit in case such sign has been constructed and erected in accordance with the ordinances of the City.

Section 1646 above referred to, however, contains a provision that the authority granted for the erection of any sign of this character may be revoked at any time by order of the Mayor or of the City Council, and in case of such revocation there can be no refund of the permit fee. This revocation clause was enacted on the theory that such sign would occupy space over public property, and that its removal in places where it was objectionable for any good reason could be required. It may be contended that there is some limit to this power of revocation, but it would seem that in the present instance such action would be lawful. We base this on the fact that the complaints and report show that the sign projects 15 feet from the side of the building over the sidewalk, is over 6 feet in width vertically, has very little illumination on it compared to its size, and tends to obstruct the light from other signs.

We therefore regard it as within your power to revoke the permit for this sign if you see fit to do so.

Yours truly,

LEON HORNSTEIN,

First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Sale of School Lands.

January 4, 1927.

MR. P. G. KEMP, Chairman, Chicago Aero Commission.

Dear Sir :

In reply to your letter concerning the purchase by the City of Chicago of that part of School Section 16 now covered by a lease between the Board of Education and the City of Chicago and used as a municipal air port, we submit the following :

The said Section 16 is one of the original school sections ceded by the Federal Government to the State of Illinois for school purposes. Such conveyance amounts to an unconditional transfer to the State. It is subject, however, to the State School Law in relation to the sale of common school lands.

Section 227 of the School Act provides that in the subdivision of common school lands no lot shall contain more than eighty acres. Section 229 provides for sale at public auction. While there are some special features of the school law which relate particularly to the sale of school lands in the City of Chicago, nevertheless, it would seem that the requirements of the statute just mentioned must be observed.

Yours truly,

LEON HORNSTEIN,

First Assistant Corporation Counsel.

Approved :

FRANCIS X. BUSCH,

Corporation Counsel.

Rights of City in Connection with "Slip B" and "Salt Slip."

January 5, 1927.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

In the matter of divergence of opinion between this department and the Harbor Master as to the City's legal right concerning matters in our opinion No. 1731 with reference to the filling of Slip B and "Salt Slip," both of which open into the South Branch of the Chicago river, we now undertake to set forth the legal principles involved more at large.

The matters which concern the Harbor Master are not merely matters of policy as we understand this correspondence, but (1) that for the City to assent to the filling of these slips it would be waiving some of its legal rights, (2) that the powers conferred upon the City by statute, and in turn by ordinances, seem to vest a very definite authority and responsibility upon the Department of Public Works, (3) that when a municipality acts in the interest of the public, this power is sovereign, (4) that the question under consideration is one of law and authority as applied to the right to fill in these two slips, (5) that almost without exception the municipality has established dock lines, even though the opinion of the federal authorities has been solicited, (6) that the State has not been called into these situations because it was understood that the public interest would be amply served at the hands of the City and federal authorities, (7) that in a sense a slip is a dock line question and as such comes directly under the City's authority, (8) that the more far reaching effect of the slip filling is in the submerged land and this demands deeper consideration, (9) that should the State be dissatisfied with certain acts concerning the harbor, it can exercise its own right by refusal to concur with the City, and (10)

that the Harbor Master is exceedingly reluctant to concede the City's subordination in favor of the State.

With regard to waiving the City's rights, we do not believe that the letter of the Harbor Master very clearly and definitely sets out what these rights are, but we will undertake to set out the respective rights and powers of the City and the Department of Purchases and Construction in which the Superintendent of Water Ways is an official. The Harbor Master refers to the case of *Cummings v. City of Chicago*, decided in 1902 and reported in 188 U. S., at page 410. The question there arose under the right of Cummings to construct a dock in the Calumet river, a navigable water of the United States, entirely within the limits of the State and the limits of the City of Chicago. It was there held that neither the Act of Congress of March 3, 1899, nor any previous act relating to the erection of structures in the navigable waters of the United States manifested any purpose on the part of Congress to assert the power to invest private persons with the power to erect such structures within a navigable water of the United States, wholly within the territorial limits of a State, without regard to the wishes of the State upon the subject. It was also held that under existing legislation the right to erect a structure in navigable waters of the United States, wholly within the limits of a State, depends upon the concurring or joint assent of the state and national governments. It should be remembered that in this case the City of Chicago was acting, and the Supreme Court of the United States here refers to the act of the City as the action of the State. As the law stood at that time, the City acting as a instrumentality of the State, exercised a certain jurisdiction, and the Supreme Court of the United States observed that the concurring or joint assent of both the State and the National governments was necessary.

Prior to 1911 the City as the instrument or agent of the State exercised a considerable scope of authority with reference to these matters. In that year the Rivers and Lakes Commission Act was passed. Section 18 of the Act conferred

certain jurisdiction upon that Commission, but did not interfere to a very large extent with the City's authority. However, in 1919 said Section 18 was materially amended and the authority given to the Rivers and Lakes Commission Act was very much broadened. It is under this act that the Superintendent of Waterways exercises his official powers. Section 18 in part provides as follows:

“It shall be unlawful to make any fill or deposit of rock, earth, sand, or other material, or any refuse matter of any kind or description, or build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulk-head, jetty, or other structure, or to do any work of any kind whatsoever in any of the public bodies of water within the State of Illinois, without first submitting the plans, profiles, and specifications therefor, and such other data and information as may be required, to the Department of Public Works and Buildings of the State and receiving a permit therefor signed by the Director of said Department and authenticated by the seal thereof; * * *.”

The section then proceeds to provide penalties for the violation of the foregoing quoted part and defines public bodies of water to include streams and lakes, etc. It is apparent from the above quoted portion of Section 18 that the Legislature has lodged in the Department of Purchases and Construction, which has succeeded the said Department of Public Works in jurisdiction, full power to deal with the subject-matter of filling the two slips in question.

The United States and the States are authorities more or less separate and distinct. The States existed before the United States and the latter came into existence by reason of and through the grant and surrender of certain powers of the States to the United States, and the States can not recall these powers except by amendment to the Constitution. While the federal and state jurisdiction in many instances, as in the case of navigable rivers with a State, are concurrent so long as the Congress of the United States does not undertake to exercise exclusive jurisdiction, such is never true of the juris-

diction of the State and the so-called jurisdiction of the City. The City is at the same time the creature and the instrumentality of the State and its jurisdiction is merely permissive. When the City acts and exercises a jurisdiction as in the case of *Cummings v. Chicago*, 188 U. S. 410, it merely acts as the agent or instrument of the State, and the State through the City is exercising jurisdiction.

The case of *Du Pont v. Miller*, 310 Ill. 140, is a case clearly in point in practically every respect with the question here raised in reference to the filling of these slips. In that case Henry F. Du Pont sought to enjoin the Director of the Department of Public Works and Buildings of the State of Illinois and the Superintendent of Waterways of said department from interfering with, hindering or obstructing him from constructing a bulkhead across the entryway of a waterway known in the record as the Du Pont slip or Magazine slip. The bulkhead was sought to be put in for the purpose of filling the slip. The court, at page 149, said:

“In the case of *Ligare v. City of Chicago*, 139 Ill. 46, an attempt was made by the City of Chicago to close and fill up Ogden slip. This court there said: ‘Power is given the City by the 31st clause of section 1, article 5, chapter 24, of the Revised Statutes of 1874, page 218, “to construct and keep in repair, canals and slips for the accommodation of commerce,” but we have found no power granted to the City to close them and fill them up.’ No case or statute has been here cited giving such power to the cities of the State, and we are aware of none.”

If the City itself has no power to fill these slips and there is no statute authorizing it to grant permission to anyone else to fill them, it would seem that this case is conclusive of the question here presented. What very definite authority and responsibility is vested in the Department of Public Works by the statutes which has a definite bearing upon the question here, I am not advised, and as to the ordinances of the City Council they can only depend upon the enabling power granted by the Legislature. The opinion of the Harbor Master that when a municipality acts in the interest of the public

its power is sovereign, can only be true when it has been clothed with definite and express authority by the State Legislature, and with respect to the City's powers to fill slips, if it ever had any (and the Supreme Court in *Du Pont v. Miller* case says it never had any such powers), these powers have been definitely superseded by the powers conferred upon the Superintendent of Waterways in Section 18 of the Rivers and Lakes Commission Act. I think that the divergence of opinion and the confusion here arises from the failure to recognize the fact that the City is only a creature of the State Legislature and that the Legislature whenever it sees fit can confer or withdraw powers as it deems best.

I quite agree that the question under consideration is one of legal authority, but I regret to have to admit that under the law of the State the City has no right to fill slips or to grant a permit to fill slips, which is exclusive of the power of the State to permit or refuse to permit such thing to be done. With regard to the right of the City to establish harbor and dock lines, this power was conferred upon cities and villages by Section 16 of the Harbor Act of 1913. So far as the writer knows the City did not have that express power prior to that time. A dock line, as we understand it, is a line located by the proper authority upon which a dock retaining wall or bulkhead may be constructed for commercial purposes and for retaining the bank of a river or lake. As to harbor lines, the City of Chicago in certain ordinances passed by its City Council prior to the passage of the Harbor Act of 1913, sought to mark out certain areas or boundaries extending into Lake Michigan over which the City would have harbor jurisdiction. At the time of the passage of these ordinances no statutory authority was found therefor, and in drafting the 1913 Act it was proposed to give the City such express statutory authority. But the filling of a slip is neither a dock line nor a harbor line question. It is true that a dock or retaining bulkhead may be constructed to cut off the slip from the navigable water, but that is merely an incident to the main thing which is the filling of the slip itself, so we conclude that the matter here in question is not the question of establishing a dock

line. If the State has not been called into these situations since Section 18 of the Rivers and Lakes Commission Act has been passed and amended, it may be because the State has not seen fit to exercise this jurisdiction, but that is not the case here, and it is certainly not the situation since the decision of the *Du Pont* case.

It is also pointed out that there is a more far reaching effect of slip filling in the submerged lands and that this demands deeper consideration. Neither the State nor the City has any title or interest in the submerged lands under the waters of the slip. The title to the land under the river or stream to the center or thread of the stream is in the owner of the land bordering upon the river or stream (*City of Peoria v. Central National Bank*, 224 Ill. 43). The fact with reference to nearly all of these slips is that they were originally constructed upon private land and as a private enterprise, and the title to the submerged land under the waters of such a slip continues in the owner of the adjoining upland. The right of the public as represented by either the State or the City consists of an easement of navigation in waters which are navigable. In fact, regardless of the ownership of the underlying soil (*Schulte v. Warren*, 218 Ill. 108; *Du Pont v. Miller*, 310 Ill. 140, 145). In the event that the State should grant authority to the owner of the underlying soil of these slips to fill them, then the public would lose its easement of navigation, and the filled in slip would become private property freed from the public easement.

In regard to the opinion of the Harbor Master that if the State was dissatisfied with certain acts concerning the harbor it can exercise its own right by refusing to concur with the City. This method of approaching the question is one of policy and not a legal question. If approached in the manner indicated, we should consider it, as we have heretofore pointed out, ill-advised policy. Further, the question of the reluctance of the Harbor Master to concede the City's subordination in favor of the State is not a legal question, and we do not need to comment upon that. The real question here is has the City

the legal authority to assert and maintain the position of the Harbor Master. We are of the opinion that it does not have such authority.

Respectfully submitted,

JAMES G. SKINNER,
Special Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Incidental Expenses in Connection with Bridge Contract.

January 5, 1927.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

Your communication in reference to the 100th Street Bridge Contract has been noted. It appears that under the terms of the contract, the Fitzsimons and Connell Dredge & Dock Company bid the lump sum of \$3,500 for removing, rebuilding and maintaining the ferry landings. The contractor removed the old ferry landings. As it was found that the operation of the ferry would interfere with the construction work, and as there was no public demand for the maintenance of the ferry, the ferry service was abandoned and the ferry landings were not rebuilt.

The contractor was allowed \$500 to cover the cost of removing the old ferry landing. The contractor contends he should be paid the full amount, namely \$3,500. Is the contractor entitled to the balance of \$3,000 withheld by your Department in making up its final estimate?

Rules of interpretation of public contracts are founded in reason and common sense, and have as their touchstone the

ascertainment of the intention of the parties. Rules as aids to interpretation, however, have no place at all when a contract is plain, unequivocal and free from ambiguity.

On Page 20 of "Proposal, Specifications, etc.," under the heading "Change of Plans" is the following paragraph:

If the Commissioner deems it proper or necessary in the execution of the work to make any alteration or addition which will increase or diminish the quantity of labor or material or the expense of the work (subject to the order of the City Council as hereinbefore stated under "Increase of Price"), such alteration or addition shall not annul or vitiate the contract or agreement hereby entered into, nor release the surety thereon, and the contractor shall furnish the necessary labor and material to complete the contract as altered. The value of the work so added or omitted shall be added to or deducted from the amount otherwise due the contractor, as the case may be, and the determination of such value shall be based on the rates or prices named in the "Proposal" when such rates or prices can be equitably applied, otherwise the value shall be determined by mutual agreement between the Commissioner and the contractor.

In the light of the foregoing paragraph, the Corporation Counsel is of the opinion, the contractor is not entitled, legally, to the full unit price of \$3,500. The specifications were incorporated in and made a part of the contract. In accordance with the specific provisions of the contract, the Commissioner of Public Works was authorized to make reasonable alterations, and to determine the value of the work omitted as the result of such alterations on the basis of the rates or prices named in the contract when such rates or prices could be equitably applied. The Commissioner, in the exercise of his contractual authority, has determined the contract rates or prices can be equitably applied in ascertaining the value of the work of the contractor in removing the ferry landings, and has fixed that value in the sum of \$500.

The contention of the contractor that he should be paid the \$3,500, inasmuch as he was put to some initial expense which was not covered in the unit price, such as bond pre-

mium, assembling of plant, etc., cannot be sustained equitably.

Presumptively, the contractor took into consideration these incidental expenses at the time he entered into the contract, and spread such expenses over the contract as a whole. Furthermore, Section (c) of the contract, which applies to the ferry landings, forms only a very small part of the entire contract, and at the most should bear a relatively small portion of the aforesaid incidental expenses.

Very truly yours,

EDWARD M. QUINN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Broker's Liability to Pension Board in Purchase of Securities.

January 6, 1927.

HON. JOHN A. CERVENKA, City Treasurer.

Dear Sir:

You state in your letter of recent date, that the various pension fund boards with which you are officially connected frequently purchase securities from bond houses and pay for them before actual delivery; that in such cases the boards accept receipts in various forms, such as interim certificates, bills of sales, or sales statements; that all of these describe the issues and serial numbers of the securities so purchased; that all purchases are made with the understanding that the securities shall be registered before being delivered; and you ask certain questions as to the respective rights and liabilities of the purchaser and bond house under such circumstances.

We assume that when you speak of "bond houses" you mean the firms that act as brokers in the usual manner, and not as principals. We also assume that you are inquiring only as to possible results where good faith is exercised on the part of these brokers. It would be undertaking too much to say what results might follow in case the brokers indulged in dishonest practices.

Your first question is whether there has been constructive delivery when the pension board's check or warrant has been cashed by the broker, and what the status of the Board would be in case of failure of the broker before the delivery of the bonds.

The broker is merely the agent of the purchaser in such cases. The bonds never belong to him, and the status is the same as if physical possession had been taken of the bonds. Such bonds while in the broker's possession are free from liability to the broker's general creditors (*Wahl v. Tracy*, 139 Wis. 668). Consequently, if the broker subsequently goes into bankruptcy or insolvency, the client may redeem the bonds from the assignee or receiver (9 Corpus Juris, 543, and authorities cited).

Speaking of cases where the securities are not fully paid for, but held by the broker on account of advances made by him, Jones on Pledges (2d Ed.) says:

"It does not matter that the actual possession of the stock was never in the customer. The form of a delivery of the stock to the customer, and redelivery by him to the broker, would have constituted a strict, formal pledge. But this delivery and redelivery would leave the parties in precisely the same situation they are in when, waiving this formality, the broker retains the certificates as security for the advance" (Section 496, quoting *Lamprecht v. State*, 84 Ohio St. 32).

Necessarily, where the stocks or bonds have been fully paid and the broker has reported the numbers to the clients and merely awaits the registering of same before turning them over, the above doctrine applies even more forcibly.

Your next question is, "Upon whom would the loss fall should the securities be lost while in transit for the purpose of registration before registration had been made?"

Necessarily, where the broker acts merely as the agent of the Pension Board, the loss would fall on the Pension Board if due care has been exercised by the broker. The question of what constitutes due care is sometimes a debatable one, but the general rule is thus stated:

"A broker is bound to exercise reasonable skill and diligence in the transaction of the business intrusted to him, and he will be responsible to his principal for any loss resulting from his failure to do so; beyond this he is not bound. If he exercises the same degree of care and diligence that a prudent man would exercise in a like business he is not liable for losses resulting to the principal" (9 Corpus Juris, 535).

While the above is given in connection with the liability of a broker in performing his work, it holds good with reference to accidental loss of the kind mentioned. Thus, it has been held that an agent is not liable for deterioration of goods (*Forstall v. Fowler*, 15 La. 299), for a mistake of an employee in keeping books of account (*Schmidt v. Pfau*, 114 Ill. 494), nor for the loss of papers containing title to land placed in his hands when he intrusted them to another for examination (*Stanberry v. Moore*, 56 Ill. 472).

Your third question is whether the Pension Board would be regarded as an ordinary creditor in case of the failure of the broker while the securities were in his possession. This has already been answered by what we say above. The Board would have the right to demand the bonds from the receiver or assignee, and would not stand in the relation of a general creditor.

Your last question relates to the position of the Pension Board if the broker had sold the securities to a third party during the interim from the time they were purchased and the failure of the broker.

In a case of that character the Pension Board could pursue the property as its own unless rights of innocent third parties had intervened, as in the case of purchase for value. But if that has happened the Pension Board would stand in the relation of a preferred creditor.

“No creditor of a bankrupt could justly demand that the estate of the bankrupt be augmented by the wrongful conversion of the property of another, or the application to the general estate of property which never rightfully belonged to the bankrupt” (*Gorman v. Littlefield*, 229 U. S. 19).

Therefore, if there is enough money of the bankrupt in the hands of the trustee to pay such a claim it must be paid. If there is no money to pay the Board, the transaction has gone beyond one of good faith and it is impossible to say what may be recovered by the Board in such a case of fraud.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Validity of Instrument of Vacation.

January 10, 1927.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We have your request of December 24, 1926, for an opinion as to the validity of a certain instrument purporting to vacate certain blocks in A. Gate's Subdivision of the southeast quarter (SE $\frac{1}{4}$) of Section thirty-one (31), and the southwest quarter (SW $\frac{1}{4}$) of Section thirty-two (32) in Township forty

(40) North, Range thirteen (13) East of the Third Principal Meridian.

We have examined said instrument. Said instrument of vacation vacates a certain number of lots in certain specified blocks. After specifically vacating a certain number of lots and mentioning several specific blocks, there is added the phrase, "Resolving them into unsubdivided blocks."

Giving the above quotation the ordinary and usual construction and applying its ordinary explanatory meaning to the matters preceding, we are of the opinion that said instrument of vacation not only vacated all the lots in Block 19, but also the original alley.

We are not passing on the validity or effect of said instrument of vacation as to any other blocks or lots mentioned therein.

We have made a copy of said instrument of vacation from the records in the Recorder's Office and are returning the same attached hereto.

Yours truly,

FRANK T. HUENING,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Change of Site for Construction of Refuse Destructor.

January 11, 1927.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

Your letter concerning the proposed change of the site for the refuse destructor which you have contracted for was referred to the writer for consideration and reply.

It appears that you have entered into a contract with the Rust Engineering Company for the construction of a refuse destructor on a site set forth in both the specifications on which bids were received and the executed contract. Since entering into the contract there has been a change of conditions which renders the site agreed upon no longer available. The question now arises whether it will be lawful, upon the mutual consent of the parties, to construct the improvement on a new location that has been chosen.

In case the contract had not been awarded and duly entered into, there would be no question about your inability to change the location after competitive bids had been taken for the site specified. The rule in such a case, as stated in Dillon, in his work on Municipal Corporations (Sec. 807), is that "if a contract differing therefrom in terms be awarded or made, it cannot be said to have been the result of the competition which the statute requires, and it is invalid." Our Supreme Court, in the case of *Pells v. City of Paxton*, 176 Ill. 318, not only held that a material change precludes the letting of the contract, but that where some work was done without proper authority there could be no special assessment levied to pay for it.

The present case is somewhat different from adjudicated cases on this subject, which all hinge on the theory that there was bad faith manifested in making a change after bids were received, and most of them relate to contracts which had not yet been entered into. Here the contract was entered into in good faith and was regular in form and conformed to the specifications and bids. It was merely upset by conditions which arose thereafter. In fact, there is great likelihood of loss resulting to the City by way of a judgment in damages, if a way is not found for adjusting the difficulty.

Hence, the contract may be modified by the City under the rule laid down by the author above quoted (Section 820), which is as follows:

"A city or other municipal corporation having the power to make a contract can deal with the contract in

the same manner as if it were a natural person, and may, in the absence of a statutory limitation upon its powers, or conformably with such limitations, *change, modify it, or cancel it* in the same manner as it might originally contract. But the modification must be made *by officers of the municipality having authority* to act in that respect. If the officers are without authority, the modification is not binding on the municipality. But the *assent of a municipal corporation to the variation or modification of a contract* need not necessarily be expressed by the formal action or resolution of the common council; it may be *implied from acts* relating to the contract work subsequent to the date of the contract; * * *."

In such a case it has been held that where certain work is stipulated to be done under the direction of a street commissioner, this officer has authority to require extra work to be done or extra material to be furnished, where these are rendered necessary by the action of the City authorities subsequent to the making of the contract, and where, without such extra work or materials, it would be impossible to fulfill the requirements of the contract.

Messenger v. Buffalo, 21 N. Y. 196.

What happened in the present case is that the Zoning Board of Appeals, in a proceeding instituted after a permit was granted to the City to build the refuse destructor at the proposed site, denied the City the right to build there. This was an act of the City authorities which, because it occurred subsequent to the making of the contract, gave the Commissioner of Public Works power to act under the following clause of the contract:

"The right is reserved to the City of Chicago, through its Commissioner of Public Works, to make alterations in the plans or specifications for the work included herein."

By the following clause, if such alterations increase the expense, the Commissioner is required to report to the City Council and get the authority to make the changes. This is

not necessary, however, where the expense is not increased, as in this instance.

We are therefore of the opinion that the Commissioner of Public Works has the authority to make the change in site without applying to the City Council for authority to do so.

Yours truly,

LEON HORNSTEIN,

First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Widening Western Avenue from Lawrence to Belmont Avenues.

January 12, 1927.

HON. WILLIAM H. PONTOW, Alderman 50th Ward.

Dear Sir:

Your letter of January 7th, addressed to the Honorable Francis X. Busch, Corporation Counsel, and transmitting copy of communication received by you from the owner of property situated at 4414-16 North Western avenue, has been referred to the undersigned for reply.

This is a matter about which we are thoroughly informed. The permit issued to your correspondent by the building department of the City of Chicago distinctly specified that no part of the building to be constructed was to project over the new line of Western avenue. Notwithstanding this fact, the contractor—mistaking the new line as shown in the survey—actually built the building four and one-half inches over the new line of the street. No misrepresentations of fact were made to the owner or the contractor

by the City of Chicago. It is a plain case of mistake by the contractor, and as a legal proposition the owner has a right of action against the contractor for any damages that have resulted or may result.

Your correspondent's name is not appended to the letter but I presume it is Krohn. A gentleman of that name who represented himself to be the owner, has called at this office on different occasions and taken up with us the question of what procedure he should follow in order to minimize his damage or to avoid expense of any kind because of the situation that now exists. We told Mr. Krohn that in our opinion the proper thing to do was to request the City Council to give him a license to maintain his building in its present position during the life of such building. We further advised him to engage a lawyer to prepare the necessary papers and to present the matter to the City Council, but stated that we would co-operate with his attorney in every way for the purpose of procuring the desired authority from the Council.

We do not believe that a deviation of four and one-half inches in the sidewalk line of Western avenue at the point in question will constitute any material inconvenience to the public, and if the owner is protected by a council order from being required to move or reconstruct the improvement, he will be fully guaranteed against any loss or damage.

Truly yours,

THOMAS A. SHEEHAN,
Attorney, Board of Local Improvements.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

License Fee for Theatre Operated Partly for Charity.

January 14, 1927.

HON. THOMAS P. KEANE, City Collector.

Dear Sir:

You have forwarded to this department an affidavit signed by Mr. Ellis F. Glickman, the owner of Glickman Palace Theatre located at 1145 Blue Island avenue, with an inquiry as to whether Mr. Glickman is entitled to the benefit of the proviso added to Section 181 of The Chicago Municipal Code of 1922, which was passed on November 24, 1926 (Council Journal, page 4759). The said proviso is intended to reduce the license fee of theatres which give a large percentage of their performances for charity. It reads as follows:

“Provided, however, that where one-third of the performances for the year of any theatre are given for and on behalf of charity, such theatre shall only be required to pay the sum of \$200.00 per annum as its license fee for the ensuing year.”

The affidavit of Mr. Glickman sets forth that during the year of 1926 there have been given performances on an average of nine each week, and of the total performances given throughout the year more than 50 per cent have been given for charitable purposes.

So far as the affidavit is concerned, there is no doubt that it comes squarely within the proviso above set forth.

The only reason that you ask the question is that it appears that no license was issued for the year 1926 to Mr. Glickman or any other person to conduct a theatre at the premises in question.

It may be that the provision was intended to apply to such persons as had been operating a theatre under a proper

license, but its language is such that it makes no exclusion of any kind. The only provision in the ordinances at the present time which might affect the right of Mr. Glickman to his license is Section 2429 of The Chicago Municipal Code of 1922, which reads as follows:

2429. *No license or permit to any person indebted to city.*) Hereafter no license or permit shall be issued to any person, firm or corporation indebted to the city, unless and until such person, firm or corporation discharges and pays to the city of Chicago all indebtedness then due from such person, firm or corporation."

In case a license had been issued to Mr. Glickman last year and he was indebted to the City for it, he would not be entitled to a new license under the section just quoted, nor would he be entitled to a license if action of any kind had been taken to compel payment of a license fee. In the absence of any action on the part of the City, and, so far as we know, of even a demand on the part of the City, we do not think we are at liberty to construe the proviso passed on November 24, 1926, in such a way as to preclude the issuance of a license to Mr. Glickman.

We, therefore, recommend that a license issue to him upon payment of \$200.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Carrying Fire-Arm in Automobile.

January 14, 1927.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

This is in reference to your request for an opinion as to the legality of the act of a citizen, namely, Theodore R. Zack, in carrying a gun in the side pocket of his automobile.

Section 1248 of The Municipal Code of Chicago provides:

“It shall be unlawful for any person within the City *to carry or wear under his clothes or concealed about his person*, any pistol, revolver, * * * unless licensed to do so under the provisions of an Act of the General Assembly * * *.”

Section 1260 of The Municipal Code of Chicago provides:

“It shall be unlawful for any person to *purchase* any pistol, revolver * * * or other weapon of like character, which can be concealed on the person, without first securing from the superintendent of police a permit so to do. Before any such permit is granted an application in writing shall be made therefor, setting forth in such application the name, address, age, height, weight, complexion, nationality and other elements of identification of the person desiring such permit, and the applicant shall present such evidence of good character as the superintendent of police in his discretion may require.”

Section 137 of Chapter 38, Cahill's Illinois Revised Statutes, 1925, provides:

“It shall be unlawful for any person *to carry concealed upon his person*, any pistol, revolver, or other fire-arm, without a written license therefor, issued as herein-after prescribed in this section.”

It will be noted from the foregoing provisions of The Municipal Code and the State Statutes, that it is unlawful to carry a deadly weapon concealed upon or about one's person.

Kindly refer to Opinion Number 1665 of the Corporation Counsel, rendered to you under date of October 4, 1926. That opinion, in effect, answers your present query. For your convenience, the final paragraph of Opinion Number 1665 is restated herein, to wit:

The decisions above quoted from draw an obvious distinction between a revolver carried in an automobile in close proximity to the person and so as to be readily accessible even though not actually on the person, and one carried at a place in the car in such a way that it cannot be used instantaneously. In the latter case the presumption of law would be that the weapon was being lawfully transported, but a party cannot excuse himself by the claim that he is merely transporting the weapon and this presumption must give way when it appears that the weapon was carried within such easy reach as to be ready for instant use.

Yours very truly,

EDWARD M. QUINN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Delivery of Explosives to Park Commissioners.

January 18, 1927.

MR. JOHN PLANT, Chief Fire Prevention Engineer.

Dear Sir:

This will acknowledge receipt of your letter of the 14th instant requesting the views of this department.

The Hercules Powder Company have advised you that the Lincoln Park Commissioners desire said company to deliver 50 pounds of dynamite at Lincoln Park and the Hercules Powder Company ask you to permit this delivery.

Sections 1425-1449 inclusive of the The Chicago Municipal Code of 1922 govern the sale, keeping and use of dynamite and other explosives and provides certain requirements in great detail as to licenses, bonds, certificates of fitness, magazines, thaw houses, blasting, etc.

You refused permission, you state, to the Hercules Powder Company to deliver the dynamite requested because the Lincoln Park Commissioners are not licensed by the City of Chicago under the above mentioned ordinances to receive, store or use explosives, nor has any of its employees a certificate of fitness as required by the said ordinances.

Our Supreme Court has written several opinions upon the powers of the various parks boards; 150 Ill. 516; 152 Ill. 392; 263 Ill. 446; 286 Ill. 504; 295 Ill. 486. This department has also written many opinions upon the subject to the various executive officers of the City and for that reason we do not think it necessary to go into detail in the present instance.

We assume that the Hercules Powder Company is licensed under the above mentioned ordinances to sell dynamite, that it has furnished and filed with your bureau the bond required by the ordinances, and that it will comply in the transportation of such dynamite with the provisions of Section 1438 relative to the transportation of explosives through the streets of the City and the details thereof including the requirements that the two persons in charge of the vehicle used in such transportation hold certificates of fitness as required.

Under the statute the Commissioners of Lincoln Park are given broad powers in certain respects, and we assume that the dynamite in question is to be used in the improvement of the park. We see no objection in your permitting the Hercules Powder Company to deliver the dynamite at Lincoln Park to the Commissioners of Lincoln Park.

Upon the delivery of the dynamite to the Lincoln Park authorities, a responsibility rests upon said authorities to see that in the use of the dynamite for the improvement of the park life and property are duly safeguarded.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

License for Explosives for Waterworks Construction Division.

January 18, 1927.

MR. JOHN PLANT, Chief Fire Prevention Engineer.

Dear Sir:

This will acknowledge receipt of your letter of January 14th relative to application of the Water Works Construction Division of the Bureau of Engineering for license to use and keep explosives for blasting purposes for said Bureau and requesting that individuals whose names appear thereon and employed in said Bureau be granted certificates of fitness.

Sections 1425-1449 of The Chicago Municipal Code of 1922 set forth in great detail requirements as to the keeping and use of explosives, application requirements, investigations, license fees, bonds required, certificates of fitness, magazines, thaw houses, blasting, etc.

You wish to be advised whether your Bureau should certify that the Water Works Construction Division of the Bureau of Engineering be granted an explosive license and that the individuals named in said application be granted cer-

tificates of fitness, or would the said Bureau of Engineering be allowed to store and to use explosives and allow said individuals to handle explosives without any approval from your bureau.

Under express authority of the Legislature, Sections 1425-1449 of The Chicago Municipal Code of 1922 governing the keeping and use of dynamite and other explosives have been enacted in the interest of public safety, and we know of no reason why the Water Works Construction Division of the Bureau of Engineering should not comply with the terms of said ordinances as the said division is not exempted from its provisions. But we see no object, however, in requiring said division to pay the fees or furnish the bonds required by the ordinances above referred to. Opinions of 1914, page 842.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Zoning Ordinance Regulation Concerning Height of Buildings and Set-Backs.

January 19, 1927.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

We are in receipt of your letter of January 7th requesting our views as to the proper interpretation of that clause of Paragraph d of Section 21 of the Zoning Ordinance which reads, "Provided that for each 1 per cent of *the width of the lot on the street line* that the *street wall* above the street line

height limit is greater in length than 50 per cent of the width of the lot, such wall shall be erected not nearer to such street line than 1 foot."

Paragraph (d) in its entirety is as follows:

"(d) In a 1st or 2nd Volume district which is also in a Commercial or Manufacturing district, or in a 3rd, 4th or 5th Volume district, if the area of a building is reduced so that above the street line height limit it covers in the aggregate not more than 25 per cent of the area of the premises, the building above such height shall be excepted from the volume and street line height limit regulations. The aggregate volume in cubic feet of all such portions of the building shall not exceed one-sixth of the volume of the building as permitted by this ordinance on the premises upon which such portions are erected; provided that for each 1 per cent of the width of the lot on the street line that the street wall above the street line height limit is greater in length than 50 per cent of the width of the lot, such wall shall be erected not nearer to such street line than 1 foot; and further provided that for each 10 feet in height that any such portion of the building is erected above the street line height limit, such portion of the building shall be set back 1 foot from all lines of adjacent premises. For purposes of this paragraph, the permitted volume of a building in the 5th Volume district shall be the cubic contents of the space which may be occupied under the provisions of Section 20 of this ordinance."

Obviously the purpose of the above paragraph is to allow a building under certain circumstances to have a portion thereof, commonly called a tower, above the street line height limit provided by the ordinance, the said tower constructed above such height limit to be exempted from the volume and street line height limit regulations of the ordinance. However, the portion thereof commonly called a tower must be so reduced above the street line height limit that it covers not more in the aggregate than 25 per cent of the area of the premises and that its volume does not exceed $1/6$ of the volume of the building permitted by the Zoning Ordinance for the particular volume district where located.

Your difficulty seems to be in regard to a situation where the street wall of a so-called tower exceeds fifty per cent of the width of the lot and whether in such case the entire street wall of the so-called tower must be set back from the street line 1 foot for each 1 per cent that the street wall of the tower is greater in length than 50 per cent of the width of the lot, or whether it is only the excess over such 50 per cent that must be set back.

We have considered this matter very carefully in connection with the other provisions of the Zoning Ordinance. While we feel that the language in the clause you mention is not as plain as it might be, yet we have no doubt it is the intent of the ordinance that in all cases the street wall of the so-called tower may be erected at the street line up to fifty per cent of the width of the lot and that it is only the excess over the said 50 per cent which must set back from the street as provided by the ordinance.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Exhibition of Motion Pictures of Prize Fights.

January 20, 1927.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

We are in receipt of your letter of the 19th instant concerning a request for a permit made to exhibit moving pictures of the Dempsey-Tunney fight.

You wish to be advised as to whether or not this application should be acted upon favorably and a permit granted to exhibit these pictures within the City of Chicago.

Paragraph 2787 of The Chicago Municipal Code of 1922 is as follows:

“2787. *Immoral pictures—permit not to be granted.*) If a picture or series of pictures, for the showing or exhibition of which an application for a permit is made, is immoral or obscene, or portrays depravity, criminality or lack of virtue of a class of citizens of any race, color, creed or religion and exposes them to contempt, derision or obloquy, or tends to produce a breach of the peace or riots, or purports to represent any hanging, lynching or burning of a human being, it shall be the duty of the superintendent of police to refuse such permit, otherwise it shall be his duty to grant such permit.”

It will be observed from a careful reading of this paragraph that it provides that substantially fifteen types, classes or kinds of pictures shall be refused permits for exhibition:

- 1, immoral; 2, obscene; 3, portrays depravity;
- 4, portrays criminality; 5, portrays lack of virtue of a class of citizens of any race; 6, portrays lack of virtue of a class of citizens of any color; 7, portrays lack of virtue of a class of any creed; 8, portrays lack of virtue of a class of any religion; 9, exposes them (class of citizens) to contempt; 10, exposes them (class of citizens) to derision; 11, exposes them (class of citizens) to obloquy; 12, tends to produce a breach of the peace or riots; 13, purports to represent any hanging; 14, purports to represent any lynching; 15, purports to represent any burning of human being.

The Criminal Code of the State of Illinois (Sections 231-236) heretofore prohibited prize fighting (Smith-Hurd Illinois Revised Statutes [1925], Secs. 480-485), and since Paragraph 2787 prohibited the showing of an immoral picture—the question was presented in connection with this class of moving pictures because they depicted in their exhibition un-

lawful acts whether or not these "fight" pictures were immoral. (Opinions of the Corporation Counsel and Assistants, Nov. 1, 1921.) However, in 1925 the Legislature of our state passed an Act in relation to athletic exhibitions creating a commission prescribing its powers and duties, providing penalties for violation of the provisions thereof and repealing (Section 31, Smith-Hurd Illinois Revised Statutes, 1925) of an Act therein named. (Filed July 13, 1925, L. 1925, p. 164.)

Section 31 of this Athletic Exhibition Act (Rev. Stat. 1925, Chap. 10-4/5) providing for the repeal of former statutes is as follows:

"31. *Repeal—when Act does not apply.*) §31. The provisions of Sections 231, 232, 233, 234, 235, and 236 of an Act entitled 'An Act to revise the law in relation to criminal jurisprudence * * * shall not apply to any boxing or sparring match or exhibition conducted, held or given by any club, corporation or association duly licensed in accordance with the provisions of this Act, or to any amateur boxing or sparring match or exhibition as herein defined.'"

The Athletic Exhibition Act of 1925 also provides for the organization of a State Athletic Commission and further provides that "boxing, sparring and wrestling matches or exhibitions for prizes or purses or where an admission fee is charged or received may be held within the State of Illinois, except on Sunday, subject to the direction, management and control of the State Athletic Commission." (Section 8, Chapter 10-4/5, Smith-Hurd, 1925.)

The Act also establishes a comprehensive series of rules regarding matches. (Section 19, Chapter 10-4/5, Smith-Hurd, 1925.) The Act further provides that sparring and wrestling matches or exhibitions shall not be held within any municipality until the question has been submitted to the voters of such municipality at a general or primary election and a majority of the votes on such question have been in favor of such contests or exhibitions within such municipality. (Section 34, Chapter 10-4/5, Smith-Hurd, 1925.)

Pursuant to the provisions of Section 34 of this Act, the question of conducting sparring, boxing or wrestling matches or exhibitions within the City of Chicago was presented to the people of this municipality at an election which resulted in a majority of the votes on this question being in favor of such contests or exhibitions.

Consequently, subject to the rules of the State Athletic Commission and municipal ordinances that may from time to time be passed under authority granted by the Legislature, boxing, sparring and wrestling matches or exhibitions for prizes or purses may be lawfully held in Chicago.

It is obvious from what we have stated, therefore, boxing being now legalized in Illinois, that unless the Dempsey-Tunney fight pictures violate any of the provisions of Paragraph 2787 of the ordinances of the City of Chicago, they may be exhibited and a permit for the exhibition thereof be granted.

In a previous opinion of this office (Opinions of the Corporation Counsel and Assistants, July 27, 1910) it was held that the exhibition of moving pictures of the Jeffries-Johnson prize fight within the City of Chicago was unlawful. The reasoning of this opinion was predicated in the main upon the fact that the Criminal Code of Illinois (Section 232, Chapter 38, Hurd's Revised Stat. of 1908) made engaging in a prize fight a crime and the argument proceeded that since prize fighting was a crime, the exhibition of the pictures of a prize fight necessarily portrayed a crime, and consequently the exhibition of pictures of this character was unlawful.

With the passage of the Act in relation to athletic exhibitions and the creation of a State Athletic Commission, of course, the foundation for the reasoning in the Corporation Counsel's opinion above referred to is removed and cannot now prevail.

From the information before us, we understand that the Dempsey-Tunney fight was held under the rules and regulations of the Athletic Commission of the State of Pennsylvania; that the act creating the Athletic Commission of the

State of Pennsylvania is substantially similar to the Act adopted by our Legislature and the film in question contains no alien matter to the Dempsey-Tunney fight which can be considered objectionable under the fifteen inhibitions contained in Paragraph 2787 of our ordinances. Of course, if the moving picture contained any elements of immorality or obscenity or unlawfulness aside from the boxing exhibition itself, a permit could rightfully be refused to exhibit this moving picture. This does not appear, however, to be the fact in this case.

Our opinion, therefore, is that the exhibition of the Dempsey-Tunney fight pictures does not violate any of the provisions of Paragraph 2787 of The Chicago Municipal Code of 1922.

Very truly yours,

BARNET HODES,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Use of Premises Where Variation Is Permitted.

January 21, 1927.

ALD. ROBERT E. BARBEE, Alderman 17th Ward.

Dear Sir:

This will acknowledge receipt of your letter of January 20th.

The Board of Appeals, it appears, granted a variation in the application of the regulations of the Zoning Ordinance of November 3, 1926, to permit the erection of a four-story addition to the rear of an existing factory building at 6320-

6332 Harvard avenue. These premises under the Zoning Ordinance are in an apartment district. In granting permission to erect this factory building, the Board of Appeals fixed certain conditions in its resolution, among them being the condition "that the premises south of the building shall not be used as a driveway."

It further appears that on January 3, 1927, there was introduced in the City Council, through the City Clerk, an order for a driveway on said premises; that you happened to hear the order read and had it referred to the Committee on Local Industries, Streets and Alleys, and you suggest that if you were not in the council chamber at the time the order might have been passed by the City Council. The premises mentioned are situated in your ward.

You wish to be advised, first, whether there is any ruling requiring the City Clerk to notify the alderman of an order or ordinance wherein his ward is affected before being presented to the City Council. If not, you wish us to prepare a resolution along that line and requiring that such orders or ordinances should be referred by the Council to an appropriate committee and the alderman of the ward duly notified.

We have to advise you that there is no rule exactly along the line you suggest, but there is the following which appears in the City Council Proceedings of January 30, 1925:

"Resolved, That in all cases where orders or ordinances are introduced in the City Council through the City Clerk, the aldermen of the respective wards affected by such orders or ordinances shall be advised in writing by the City Clerk of the introduction of said orders or ordinances:

Unanimous consent was given to permit action on said resolution without reference thereof to a committee.

Alderman Powers moved to adopt said resolution.
The motion prevailed."

At your request we are preparing a resolution along the line you suggest, requiring the reference of all such orders or

ordinances introduced through the City Clerk to appropriate committees, and are enclosing the same herewith.

In reference to your suggestion as to whether if the said order for a driveway had been adopted by the City Council, it would have taken precedence over the ruling of the Board of Appeals of November 3, 1926, we do not think it necessary to pass on that question at this time, inasmuch as the order for the driveway has not been passed by the City Council and no permit for such driveway has been issued. If you should desire us to do so, we will be very glad to go into the subject further for you.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Parking Restrictions in Designated Area in Residential District.

January 21, 1927.

HON. E. I. FRANKHAUSER, Alderman 49th Ward.

Dear Sir:

We have your communication in which you ask for the opinion of the Corporation Counsel "as to the validity of the ordinance" passed June 25, 1926 (appearing on pages 3838-3839 of the Journal of the Proceedings of the City Council for that date), providing for restrictions upon the parking of vehicles on designated portions of Arthur, Lakewood, Magnolia, Wayne and Glenwood avenues. Section 1 of the ordinance reads as follows (Section 2 of the ordinance provides

a penalty by fine for violation of the restrictions imposed by Section 1 and Section 3 merely provides for the time when the ordinance shall be in effect) :

“No person shall park or leave standing any vehicle on or along the following streets from 6:00 o'clock P. M. until 10:00 o'clock P. M. daily, except Sunday, and from 1:00 o'clock P. M. to 12:00 o'clock P. M. Sundays:

Magnolia avenue from the north line of the first east-and-west alley north of Devon avenue to the north line of Arthur avenue;

Lakewood avenue from the north line of the first east-and-west alley north of Devon avenue to the north line of Arthur avenue;

Wayne avenue from the north line of the first east-and-west alley north of Devon avenue to the north line of Arthur avenue;

East side of Glenwood avenue from the north line of the first east-and-west alley north of Devon avenue to the south line of the alley north of Arthur avenue;

Arthur avenue from the west line of Sheridan road to the east line of Glenwood avenue.”

While the language of that section is somewhat inartificial, we think it clear that the words “shall park” and “leave standing” are used synonymously, and that the word “park” is used in the sense in which that term is now commonly used to designate the *temporary storage* of automobiles and other vehicles when not in actual use for purposes of travel and passage. (*Griffin v. Neil*, 198 Ia. 1359.) We do not understand the ordinance to forbid the standing of vehicles upon the portion of the streets designated during such times as may be necessary and reasonable for the loading or unloading of persons or goods, or during such times as may be necessitated by accident or misadventure in travel along those streets or merely the incidental consequences of the travel and passage of the public upon and along such streets. Such standing of vehicles as shall be reasonable and necessary for the loading and unloading of persons or goods, would in most cases fall within the right of ingress and egress which

belongs of right to the owners of abutting property and such right of ingress and egress, while subject to reasonable regulation, cannot be taken away or destroyed without affording compensation to the owners of the properties affected. (Elliott on Roads and Streets, 4th ed., Sec. 876, *et seq.*) The standing of vehicles upon the streets for purposes merely incidental to travel or during such times as may be reasonably necessary in consequence of accident or misadventure while traveling is consonant with the common right of the public to travel upon the streets (*Reynolds v. Murphy*, 135 N. E. 116), and while such periods are subject to reasonable regulation, we do not understand the present ordinance to be intended to include them, or to place restrictions upon the use of streets in such instances. On the contrary, that which we understand to be forbidden is the *standing or storing of any vehicle* upon any of the portions of the streets designated, and during the hours specified in the ordinance merely for the convenience of the owner or driver thereof, and during such period or periods of time that such owner or driver having cared for or completed whatever transactions, purposes or pursuits shall have brought him to that place, shall desire further to use the vehicle.

Such standing or parking of vehicles upon the streets amounts to the use of the streets for purposes of storage and not for purposes of travel. It can make no difference whether such periods of storage-use shall continue for a few minutes only or for much longer periods—in some cases extending to many hours in one such period. The character of the use made of the streets will not be different whether such vehicles be left unattended or left in charge of a driver or other caretaker awaiting the return of an owner or occupant having general control and direction over the vehicle, *nor will the character of that use be changed whether the person so parking or leaving standing any car or vehicle shall be the owner or occupant of the property abutting on the street, or any other member of the general public.* Your inquiry, therefore, is (1) whether the ordinance, so construed, assumes to deprive the owners or users of vehicle of any common right in

the use of the streets or the portions thereof designated in the ordinance, which is protected by the fundamental laws of the state from destruction or impairment by the legislative power of the State or its delegate, the City, and (2) assuming the first question to be answered in the negative and that restrictions upon the use of the streets might be imposed by the State itself, whether the ordinance transcends the legislative powers which the Legislature of the State has seen fit to bestow upon the City Council in respect to streets and public ways within the City.

A few statements and citations will suffice to answer the second question and make clear that the State has delegated to the City the right and authority to regulate the use of its streets in respect to the standing or storing of vehicles thereon as fully as might be done by the State itself. Section 1 of Article V of the Cities and Villages Act delegates to the City general authority over the opening, improvement and use of streets in the following terms:

“The City Council in cities, and the president and board of trustees in villages shall have the following powers:

Seventh—To lay out, to establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks and public grounds, and vacate the same.

Ninth—*To regulate the use of the same.*

Tenth—To prevent and remove encroachments and *obstructions upon the same.*”

While the cases construing these provisions of the Cities and Villages Act have generally related to acts of the city authorizing, or attempting to authorize, certain uses of the streets, and have not dealt with restrictions imposed by ordinance upon the use of streets, they clearly establish the policy of this State since earliest times to delegate full control and jurisdiction of streets to the corporate authorities of municipalities in which such streets are located. In *Sears v. City of Chicago*, 247 Ill. 204, the court said:

“Whatever may be the rule in other jurisdictions the law is settled in this State that a city may, under the power of exclusive control of its street, allow any use of them which is not inconsistent with the public objects for which they are held (citing numerous cases beginning with the 12th and ending with the 192d Illinois Reports). And it is equally well settled that the City may regulate such use and fix a reasonable compensation to be paid for the same (citing cases). The power of the municipality in this regard in cases where it owns the fee in its streets is subject to no limitation except that its exercise shall be reasonable in a manner to safeguard the paramount right of the public to the free and unobstructed use of the street for the purpose for which it was dedicated.”

In *People v. Field*, 266 Ill. 609, the court, after stating the rule that the highways of the state are under the primary and paramount control of the Legislature, which in the absence of constitutional restrictions is not limited as to the uses to which it may devote such highways (*Cicero Lumber Company v. Cicero*, 176 Ill. 9; *City of Chicago v. Harder's Van Company*, 235 Ill. 58), and that the authority of municipalities over other streets must be derived from grants by the Legislature, reached the same conclusion that in this state full and complete authority over streets has been granted to municipalities which may control their use in any manner not inconsistent with the purposes for which the streets have been dedicated.

In *People v. Clean Street Company*, 225 Ill. 470, the court said (pp. 478, *et seq.*):

“Section 62 (now Section 1 of Article V) of the City and Village Act authorizes the city authorities to lay out, establish, open, alter, extend, widen, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks and public grounds and vacate the same; to plant trees on the same; prevent and remove encroachments or obstructions on the same; to provide for the cleansing of the same; to regulate the use of sidewalk and all structures thereunder, and to require the owner or occupant of any premises to keep the sidewalk

in front of or along the same free from snow or other obstructions; to regulate and prevent the throwing or disposition of ashes or garbage or any offensive matter in, and to prevent injury to, any street, avenue, alley, or public ground.

"It will be seen that the control over the streets and alleys of a city or village, under this statute, is very broad, and *absolute power* over them is vested in the municipality." See also *Moses v. P. Ft. W. & C. R. R. Co.*, 21 Ill. 516; *Chicago Dock Company v. Garrity*, 115 Ill. 155; and *City of Sullivan v. Best*, 286 Ill. 315.

In numerous cases it has been held that the City owns the streets in trust for the public, subject to the unquestioned duty of preparing and preserving them for the use of the public, and that it cannot therefore bind itself to any use of the streets contrary to or inconsistent with this duty. (See *City of Quincy v. Jones*, 76 Ill. 231; *Field v. Barling*, 149 Ill. 556; *Hibbard & Company v. City of Chicago*, 173 Ill. 91; and *People v. Field*, *supra*.) We may conclude, therefore, that the provisions quoted would in the absence of statutory restrictions delegate to the City Council all the power and authority to enact and enforce regulations or restrictions upon the parking or standing of vehicles upon the streets of the City that, subject to constitutional limitations, would otherwise inhere in the Legislature of the State. The constitution contains no provisions directly applicable to this matter, and we may pass to consideration of the first question, viz.: whether the ordinance, construed as above set forth, assumes to deprive the owners or users of vehicles of any portion of the common right of the public to the use of the streets for purposes for which such streets have been dedicated to public use.

Elliott on Roads and Streets (4th ed., Sec. 828), discussing the right of the public to travel upon the highways and to have such highways free from obstruction, states, that,

"it is well settled that the public are entitled not only to a free passage along the highway, but to a free passage along any portion of it not in the actual use of some other traveler."

And the same author in Section 880, quoting from the decision in *Callanan v. Gilman*, 107 N. Y. 360, states that,

“The primary purpose of streets is use by the public *for travel and transportation*, and the general rule is, that any obstruction of a street or encroachment thereon, which interferes with such use, is a public nuisance.”

The same principles have been many times announced by the Supreme Court of Illinois. In *City of Chicago v. Collins*, 175 Ill. 445 (at p. 455), the court said:

“The streets and alleys of a city are held in trust by the municipality for the use of the public, *for purposes of travel thereon and as a means of access to and egress from buildings abutting thereon* or lots adjacent thereto. The right to travel on and along the streets of a city belongs to the general public, and does not belong to its denizens alone. The right to travel being in the general public everywhere, all persons have a right to pass along and use the streets and alleys of a city *in all their parts, the full width and length thereof*.”

And again in *Elie v. Adams Express Company*, 300 Ill. 340, the court said:

“The primary and paramount object in establishing streets and highways is *for the purpose of public travel*, and the public and individuals can not be rightfully deprived of such use.”

These general rules are no doubt qualified by exceptions relative to the temporary use or obstruction of streets (a) in respect to the reasonable ingress and egress of the owners of abutting property, (b) as the result of accident, (c) in respect to the services of duly authorized public utilities, and (d) as the merely incidental consequences on the exercise of the right of passage and travel by the public. In Section 1112, Vol. 1, of *Elliott on Roads and Streets*, however, in discussing the authority of municipalities vested with control over the use of streets to restrict the parking of automobiles or other vehicles thereon, it is said:

“Municipal corporations undoubtedly have power to make reasonable regulations in regard to parking automobiles on their streets. And, under the powers usually granted to them to control their streets and prevent obstructions and interference with traffic they may prohibit the parking of automobiles on particular streets.”

In *Pugh v. City of Des Moines*, 156 N. W. 892, the Supreme Court of Iowa upheld an ordinance of that city forbidding the parking of vehicles upon designated streets during specified hours, except for such time not exceeding twenty minutes in any one period as might be necessary for the loading or unloading of persons or goods. The court there rested its opinion upon the principles we have stated, and upon the power of the city to preserve its streets for the benefit of public travel, saying:

“We have these propositions established so far as the city and the general public are concerned: That the public streets of a city are dedicated to public use, and are a public way from ‘side to side and end to end,’ and that any private use thereof which in any degree detracts from or hinders or prevents its free use as a public way to its full extent is, within the meaning of the law, an obstruction or incumbrance, and any obstruction or incumbrance for private purposes is in law a nuisance; that the city is given the exclusive care and control of the streets, and it is made its duty to keep them open and in repair and free from nuisance; that the primary use or purpose for which streets are established is to afford the general traveling public a way of passage or travel, and the general traveling public are invested with the right to have them in repair and free from nuisance, that this right may be enjoyed.”

In *People v. Harden*, 179 N. Y. Sup. 732, while holding that the defendant merely by parking an automobile for a considerable time had not violated an ordinance of the city forbidding *wilful obstruction of the streets*, the court recognized the right of the city to prohibit or restrict the parking or standing of vehicles, except in so far as might be merely incidental to travel or necessary to ingress or egress from abutting property. At page 733 the court said:

“The board of aldermerr undoubtedly has authority to pass an ordinance providing that no vehicle may be permitted to remain on certain thoroughfares in such manner as to obstruct the traffic, or to limit the time during which a vehicle may be permitted to remain. Or if it be desired to prohibit willful obstruction, the ordinance may be so drawn as to provide that the leaving of a vehicle at a given place for a specified period of time is *prima facie* evidence of willful obstruction. The ordinance in question does not prescribe the act of leaving a vehicle as *malum in se*; neither does it fix a time limit which, if exceeded, would in itself constitute a violation, or from which a willful obstruction may be inferred. The ordinance should be so framed as to indicate clearly the offense prohibited.”

In *Welsh v. Town of Morristown*, 121 Atl. 697, the Supreme Court of New Jersey upheld an ordinance of the town prohibiting parking upon designated streets for any period longer than necessary for the loading and unloading of persons, or goods, and in any event longer than two minutes, saying:

“there can be no doubt that the town has power by ordinance to regulate traffic when reasonably necessary for public safety and good order, and to enact that no automobile or other vehicle shall be parked or allowed to stand for a longer time than is necessary to take on and let off passengers or baggage, and in no case longer than two minutes, in a designated public place.”

In *State v. York*, 106 So. 413, the Supreme Court of Florida held valid an ordinance of the City of Tampa, prohibiting the parking or standing of taxicabs upon streets of a designated area of the city. While that ordinance did not apply to the standing of ordinary vehicles other than taxicabs, the court did not rest its opinion upon the special nature of taxicabs, as vehicles for hire, except to recognize that difference as a sufficient basis for classification when enacting an ordinance applying to one class and not to the other. The reasons given by the court in upholding the power of the city to enact the provision would apply with equal force to

ordinances restricting the use of streets by all vehicles for purposes of standing and storage. At page 419 the court said:

“To allow taxicab stands to be located indiscriminately, regardless of the traffic conditions on the streets, might result in creating practically continuous obstructions to travel and seriously limit the area for the passage of traffic on the main arteries of a city, greatly to the detriment of the public welfare. And to hold that such matters are beyond an existing municipal power to regulate the use of streets and vehicles, when reasonably and fairly exercised, would be tantamount to holding that the city could not prevent obstructions to traffic on its main thoroughfares. In the instant case, we cannot assume that the quoted provision of the ordinance was arbitrarily adopted by the governing body of the city without regard to the reasonable requirements of local conditions. *Per contra*, when the municipal power to regulate is shown to exist, a regulatory ordinance valid on its face, and pursuant to the power, will be presumed to be applicable to and justified by local conditions, unless the contrary is made clearly to appear. * * * ‘The petition in this case does not negative the existence of traffic conditions within the area wherein the ordinance prohibits the location of taxicab stands, which might have justified the passage of the ordinance. Therefore, in the absence of allegations or proof to the contrary, this court must presume that such conditions did exist, and the ordinance therefore reasonable.’ ”

In *Beck v. Cox*, 77 W. Va. 442, the Supreme Court of Appeals of that state upheld as a proper traffic regulation an ordinance of the City of Morgantown, prescribing the portion of the street upon which vehicles might be parked, the direction in which such vehicles must face when parked, and punishing by fine the parking thereof in any other place or manner. The court there rested its decision directly upon the power of the city to preserve its streets for public travel, and to prevent and remove obstructions therefrom. In the course of its opinion the court said (page 447):

“Municipal power expressly conferred, to keep the streets free from obstruction, amply covers the subject of

standing vehicles. It would be absurd and ridiculous to say there is not power under the statute to prevent a citizen from leaving his vehicle standing across the middle of the street, or a number of citizens from completely stopping travel on a street by massing their vehicles over its entire width. These illustrations prove right of regulation of the use of vehicles for preservation of freedom of the streets from obstruction. That power extends to anything that obstructs, whatever its form or nature may be. It may be the position of a standing vehicle, or the method of direction and operating a moving vehicle, or the number and speed of vehicles moving without other regulations than those prescribed by the general law. The obvious and incontrovertible power of regulation as to standing vehicles necessarily extends to all other forms of obstruction, for the grant of power to prevent obstruction is general and without express terms of limitation. It is measured only by reason and fairness in the exercise thereof, and within these limits the mode and extent of regulation are subjects of councilmanic opinion, judgment and discretion * * *."

We think these decisions are conclusive of the principles on which all legislation regulating traffic and the use of streets whether by states or municipalities must rest. They are in fact consonant with common law doctrines in existence as settled law long before the invention of motor driven vehicles so greatly increased the use of streets for parking, standing or storage purposes.

It may, however, be suggested that by the passage of the Motor Vehicle Law the State has withdrawn from the City the powers otherwise conferred as above for the regulation and restriction of the parking or standing of motor driven vehicles upon the streets. It has, indeed, been decided that that act qualifies and reduces the powers of municipalities to the extent that the regulation of motor driven vehicles is therein provided for by the Legislature. (*City of Chicago v. Francis*, 262 Ill. 331; *Elie v. Adams Express Company*, *supra*.) We have carefully examined that act and have found nothing therein contrary to municipal authority to pass and enforce proper ordinances restricting the parking or standing

of vehicles upon the streets. Further there is added to Section 2 of that act the following proviso :

“Provided, that nothing in this Act contained shall be construed as affecting the power of municipal corporations to make and enforce ordinances, rules and regulations affecting motor trucks and motor driven commercial vehicles used within their limits for public hire, or from making and enforcing reasonable traffic and other regulations, except as to rates of speed, not inconsistent with the provisions hereof.” Smith-Hurd Revised Statutes, 1925.

It is, of course, settled law that repeals by implication are not favored and that the requirements of separate statutes shall be harmonized by the courts, if possible. This is especially true where any implied repeal is counted on to change the settled policy of the state, and it will not be denied that the policy of this state has long been to confer upon municipalities complete jurisdiction and control of the use of their streets. The same necessity for reconciling the state laws governing the licensing, registration, speed and general operation of motor vehicles upon the highways of the state and municipal regulations as to the use of streets for parking, standing or storage purposes, has also arisen in other states, and the state laws have been held not to affect the powers theretofore existing in cities to so regulate the use of streets.

In *Beck v. Cox, supra*, it was claimed that the state law had entirely superseded all municipal regulations as to motor vehicles. The court disposed of that contention in the language following :

“Not dealing fully with the subject of common right in highways, it cannot be regarded as a full and complete manifestation of the legislative will respecting it. The law of the road for vehicles other than motor vehicles, as fixed and determined by the common law, remains largely unaltered. Dealing primarily and only partially with public highways consisting for the most part of country roads, it includes municipal highways, only for

the purpose of establishing certain maximum rates of speed on them and other limitations, as well as on other highways, and placing them beyond the power of municipal dispensation, for the safety and protection of life, limb and property in general, not with reference to the exigencies or requirements peculiar to urban life and business.

Another fallacy of the argument is the implied, if not express, assumption of the grant of certain rights in highways to the drivers of motor vehicles, which, if made, would impliedly negative the existence of municipal power to curtail, restrict, regulate or abate them. It is an act of limitations, not one of grants. It proceeds upon the theory of rightful use of the highways by motor vehicles, as new agencies or instrumentalities of travel and transportation, whose owners and operators have the same right as other citizens using other agencies or means to the same ends or purposes, and then regulates that right by limitations and restrictions thereof. Not a word in it suggests, by inference or otherwise, abrogation or repeal of any power municipal corporations may have by virtue of the common law or any statute, to impose such further limitations as may arise *ex necessitate*, out of the exigencies and requirements of urban life and activity * * *."

"There is no implied repeal of these provisions, except in so far as they are limited by the general statute. Repeals by implication are not favored. Except in the case of a statute plainly intended as a substitute for all previous law pertaining to the subject matter thereof, implied repeals of pro-existent laws extend only so far as the old and new are irreconcilably repugnant. Between the general statute and the power conferred by the charter provisions to regulate the use of streets, by ordinances not dispensing with the limitations imposed by the statute, there is no repugnancy at all."

And in *Pugh v. City of Des Moines*, *supra*, the court, dealing with the claim that the vehicle owner possessed lawful authority for parking on account of his license under the state law, said:

"Conceding for the purpose of the argument that the legislature has given to the automobile driver the free use of the public streets, and that the city has no

power to exclude from the free use of the public streets, we must construct this language to mean that free use which is involved in the right to come and go and drive upon the streets without let or hindrance. *The idea of the free use of a street does not involve the right to obstruct the free use of the street. If one man, in the exercise of his right to the free use of the street, can stable his automobile upon the public street and leave it standing there, any number of persons can exercise the same right, until a point is reached where the travel upon the street is absolutely obstructed. Each, under plaintiff's contention, would be exercising his right to the free use of the street.*

We do not find anything in this ordinance inconsistent with or contrary to the provisions of the chapter relied on, and we think the ordinance is reasonable in its provisions."

"We are of the opinion, therefore, both on principle and authority, that the City Council has legislative power to enact ordinances of the character of the one under consideration for restricting in proper cases the use of the streets for parking, standing or storage purposes, where the same is deemed by the Council to impair the use of streets for the passage and travel of the public, or to interfere with the reasonable ingress and egress of abutting property. Though subject, as all municipal ordinances are subject, to judicial review and condemnation when plainly arbitrary, unreasonable or capricious, so as to amount to the abuse rather than the use of the legislative discretion of the City Council, all such ordinances must be presumed reasonable and valid until proved to be otherwise, and should, therefore, be enforced by the administrative and executive officers of the City.

Very truly yours,

C. M. DOTY,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Frontage Consents in Case of Proximity to Religious
Foreign Mission.**

January 24, 1927.

MR. JOHN PLANT, Chief Fire Prevention Engineer.

Dear Sir:

This will acknowledge receipt of your letter of December 15th with inclosures relative to application for permit for the installation of tanks for a gasoline station to be located at 721 W. 26th street.

It appears from the papers which you enclosed that the lot or plot of ground in which the tanks are to be installed is within about 50 feet of the Mennonite Gospel Mission, and you wish to be advised whether you may lawfully issue the permit.

Section 2279 of The Chicago Municipal Code of 1922 provides that "no such tank or tanks shall be installed in any lot or plot of ground where any of the boundaries of any such lot or plot of ground are within 200 feet of the nearest boundary of any lot or plot of ground used for a school, hospital, church or theater.

On November 3, 1926, the Chief Fire Marshal requested a report as to whether the said Mennonite Gospel Mission at 720 W. 26th street is a church where religious services are held. In answer to that request, Lieut. Nichola of the Fire Department, on November 4, 1926, made the following report: "Visited premises at 721 W. 26th street regarding installation of gasoline tanks for filling station purposes, and found that directly across the street which is about 50 feet, church services are conducted in Mennonite Gospel Mission, 720 W. 26th street, on Thursdays and Sundays. On Thursday evening the attendance is about 25 people, and 100 people on Sunday."

It also appears that the frontage consent petition for the garage is signed by the Central Mennonite Board of Home and Foreign Missions, per A. M. Eash, manager, for 82 feet

frontage at 720 W. 26th street, without which frontage the frontage consent petition would not be sufficient. This, however, would have no bearing upon the main problem involved herein, which is whether the premises at 720 W. 26th street which are occupied by the Mennonite Gospel Mission and which are within 50 feet of the lot or plot where the tanks for which the proposed filling station are to be installed, are used for a church within the meaning of Section 2279.

A church within the meaning of this ordinance must be construed as including any building which is regularly used for the purposes of public divine worship, without regard to its structural character. See Opinions of 1912, page 833.

There has been presented to this department the following letter from the manager of the Central Mennonite Board of Home and Foreign Missions:

“December 29, 1926.

To Whom It May Concern:

This information is relative to the 26th Street Mennonite Mission, a small mission located at 720 West 26th street, Chicago, Illinois.

As superintendent, I have been authorized by the president of the Central Mennonite Home and Foreign Mission relative to the proposed gasoline station on the southwest corner of 26th street and Union avenue, Chicago, Illinois, to write this letter. We have no objection whatever to the construction of a gasoline filling station on the southwest corner of 26th street and Union avenue. Due to the change of the population of the community, we are no longer holding services in this building. This building is used solely for the purpose of transacting the local business of this mission, and we consider the element of danger to those few who attend business meetings almost negative. In fact, this will be outweighed by the improvement of a vacant lot which is at present a rubbish dump and emits odious odors, and frequently displays undesirable pictures on the billboards. In fact, we favor the construction of the gasoline filling station on the above mentioned site.

Respectfully submitted,

Central Mennonite Board of Home
and Foreign Missions.

By (signed) A. M. Eash, Mgr.”

It will be noted that the Central Mennonite Board of Home and Foreign Missions are no longer holding services in this building; and that the building is used solely for the purpose of transacting the local business of the mission, and that they "consider the element of danger to those few who attend *business meetings* almost negative."

It would appear, therefore, that the building owned by the Central Mennonite Board of Home and Foreign Missions is not, according to the above letter, used for a church within the meaning of Section 2279, and the permit requested to install tanks at 721 W. 26th street should not be denied on the ground that the plot of ground on which the tanks are to be installed are within 200 feet of a plot of ground used for a church.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Location of Oil Tanks Near Church.

January 24, 1927.

MR. JOHN PLANT, Chief Fire Prevention Engineer.

Dear Sir:

This will acknowledge receipt of your letter of January 20th.

Application has been filed for the installation of tanks for a gasoline filling station at 2357 S. Sawyer avenue. The frontage consent petition, according to the report of verification of the Superintendent of Maps, shows a surplus of 328

feet, but it is reported by the Bureau of Maps that the plot of ground on which it is proposed to install said tanks is within 200 feet of a church.

Accompanying the application for a permit and the frontage consent petition is the following statement signed by the trustees of the John Huss M. E. Church:

“We, the undersigned, trustees of the John Huss Church, located at 2354-56 S. Sawyer avenue, have no objections to allowing Mr. Anton Turek to operate a filling station on the northeast corner of 24th street and Sawyer avenue, opposite the above named church. This property is not now used as a church.

Respectfully yours,

(Signed) Joseph F. Hrejsa,
John C. Cizkovsky,
Edward M. J. Hujia,
F. E. Steblik,
W. F. Hruby.”

Alderman Cepak has called at this department and states that this church building is about 25 feet by 40 feet; that no church services have been held therein for several months; that a short distance away from the John Huss M. E. Church in question there is another larger church building, and that the clergyman who was formerly pastor of the John Huss M. E. Church has gone to the neighboring M. E. church, and that the congregation which formerly attended public divine services at the John Huss M. E. Church now goes to the neighboring church because of a consolidation of the parishes; that it has not been definitely ascertained what the said John Huss M. E. Church building will be used for in the future.

Section 2279 prohibits the installation of any tank or tanks in any lot or plot of ground where any of the boundaries of any such lot or plot of ground are within 200 feet of the nearest boundary of any lot or plot of ground used for a school, hospital, church or theater.

We have construed this provision to include any building which is regularly used for the purposes of public divine worship without regard to its structural character.

In passing on a very similar case a few months ago, we wrote you as follows:

"It is proposed to install tanks for an oil station at 701-705 Oakwood boulevard. Proper frontage consents have been filed, but the plot of ground upon which the tanks are to be placed is within 65 feet of a building known as St. James M. E. Church.

You enclose copy of a letter from Albert W. Harris of the Harris Trust and Savings Bank, who is chairman of the board of trustees of the church, to the effect that the said church building is not being used for church purposes or any other purpose at the present time, but is standing vacant.

It also appears from information received from Mr. Harris' office that church services were last held in this church building December 31, 1925, and that since that time the church building has been vacant; that it will probably be torn down; that a new church has been erected by the congregation at 4601-4617 Ellis avenue, where the regular religious services of the congregation are now being held.

Section 2279 of The Chicago Municipal Code of 1922 prohibits the installation of tanks 'in any lot or plot of ground where any of the boundaries of any such lot or plot of ground are within 200 feet of the nearest boundary of any lot or plot of ground used for a school, hospital, church or theater.'

The question arises whether the St. James M. E. Church at 701-705 Oakwood boulevard, which is within 200 feet of the plot of ground in which the tanks are to be installed, is used for a church within the meaning of the ordinance.

A church within the meaning of the above provisions must be construed as including any building which is regularly used for purposes of divine worship. (See Opinions of Corporation Counsel of 1912, page 833.)

It is evident that the St. James M. E. Church at 701-705 Oakwood boulevard is not being regularly used for purposes of divine worship at the present time.

While the building thereon is built in the usual form of a church structure, yet the use of the building rather than its architecture is what controls, as the prohibition contained in the ordinance reads, 'any lot or plot of ground used for a church * * *.' (See opin-

ion of Corporation Counsel to General Superintendent of Police, October 20, 1926.)

It is our opinion that, in so far as we are advised, the plot of ground in which the proposed tanks are to be installed is not within 200 feet of a plot of ground 'used for a church' at the present time within the meaning of the provision of the above ordinance."

It is our opinion, in so far as we are advised in the matter, that the plot of ground at 2357 S. Sawyer avenue, wherein it is proposed to install tanks for a gasoline filling station, is not within 200 feet of a plot of ground used for a church at the present time within the meaning of the provision of Section 2279 of The Chicago Municipal Code of 1922.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Wage Assignment by Member of Fire Department.

January 24, 1927.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

In your communication addressed to the Corporation Counsel, relative to a wage assignment by a member of the Fire Department, you request an opinion as to the liability of the City in case it disregards such assignment.

The subject of wage assignments by municipal employees received the attention of the Corporation Counsel in an opinion dated January 8, 1908, (Opinions of Corporation Counsel, 1907-1908, page 238), in which it is said:

“In the case of *City of Chicago et al. v. People*, 98 Ill. App. 517, the court said:

‘The doctrine is well settled that a municipal officer can not assign his unearned salary. His undertaking so to do is but an undertaking, unenforceable and of no validity. The law also prohibits assignments of salary being had by indirection or affected by having the official appoint an attorney authorized to receive the salary and turn the same over to an assignee.

‘The performance of public service is secured by protecting those engaged in performing public duties, and it is not upon the ground of their private interest, but upon the necessity of securing an efficient public service, by seeing to it that the funds provided for the maintenance of government officials should be received by them at such periods as the law has appointed for their payment.

‘If assignment of the salaries of public officers were permitted, then the assignees would be entitled to receive the salaries directly, and thus to take the place of the assignors in respect to the emoluments, leaving the duties to be discharged by said officers a barren charge to be borne by the assignees. Such a condition of affairs would inevitably produce results disastrous to the efficiency of the public service.

‘It would be in the highest degree harmful to the public that municipal corporations should be permitted to be turned into agencies through which the collection of private debts might be enforced.

‘A municipal corporation exists for the public welfare only, and it can not be forced into a position by which its duty as to its officials in respect to their salaries shall be, not to pay them in accordance with their lawful right, but to pay the debts which they may be owing to creditors, or their stipend to those to whom they might have assigned it. *Bliss v. Lawrence*, 58 N. Y. 442; *Schwenk v. Wyckoff*, 46 N. J. Equity 560; *Am. & Eng. Ency. of Law* (2d Ed.), Vol. 2, p. 1033; *King v. Hawk-*

ins, 16 Pac. Rep. 434; *Merwin v. City of Chicago*, 45 Ill. 133; *Addyston Pipe & Steel Co. v. City of Chicago*, 170 Ill. 580; *State v. Williamson*, 118 Mo. 146; *People v. Omaha*, 2 Neb. 169; *Wallace v. Lawyer*, 54 Ind. 501; *Hightower v. Slayton*, 54 Ga. 108; *Schloss v. Hewlett*, 81 Ala. 266; *Johnson v. Pace*, 78 Ill. 143.'

In *Bliss v. Lawrence*, 58 N. Y. 442, deciding 'an assignment by a public officer of the future salary of his office is contrary to public policy and void,' the court said:

'Then there is a second ground of public policy, for which the case of *Palver v. Vaughan* (3 Swanst. 173). is the leading authority, which is this: That independently of any corrupt bargain with the appointer, nobody can deal with the fees of a person who holds an office of this description, because the law presumes, with reference to an office of trust, that he requires the payment which the law has assigned to him for the purpose of upholding the dignity and performing properly the duties of that office, and therefore it will not allow him to part with any portion of those fees either to the appointer or to anybody else. He is not allowed to charge or encumber them.'

Schwenk v. Wyckoff, 46 N. J. Equity 560, the court said:

'Unearned half pay of retired officer of the army is not assignable.'

Quoting: *Liderdale v. Duke of Montrose*, 4 T. R. 248:

'The validity of a voluntary assignment of the half pay of an officer came before the same court; it was held that there was no distinction to be made between voluntary assignment and an assignment, as in the last mentioned case under the insolvent debtor's act and so that voluntary assignment was also held to be void.'

After investigating authorities, I am convinced that the *unearned* salaries of city employees can not be assigned, on the ground that such action would be against public policy, and such assignments may be disregarded. The tendency of the courts is to sustain assignments of *past due* salary or wages, and, therefore, regard should be paid to *such* assignments."

I fully concur in the views expressed and in the conclusion reached in the foregoing opinion.

Respectfully submitted,

ROY S. GASKILL,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Kosher Meat Inspectors.

January 25, 1927.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

In reply to your request for information as to how to proceed to secure the inspection of kosher meat in order to prevent fraud therein, we submit the following:

There is no obstacle in the way of securing a classification of kosher meat inspectors under the Civil Service Law. Examinations for that purpose will have to be original entrance examinations, because there are probably not enough food inspectors who are conversant with this class of inspection to make it possible to fill the twelve (12) positions proposed for their number. This will not prevent persons employed by the City from taking the examination if they desire to.

The way to proceed, therefore, is to pass an appropriation for kosher meat inspectors, or if you prefer to do so, an ordinance of the City could be passed directing that a certain number of food inspectors accepted by the City should be of a type that can handle this sort of work. The simpler method would be to make provision by appropriation for these inspec-

tors and then notify the Civil Service Commission that this has been done.

With respect to requiring a special permit for selling kosher meat, while there may be some slight doubt as to whether this would constitute class legislation, we believe that an ordinance can be framed making a classification of dealers in meat that would not be discriminatory and would nevertheless accomplish the purpose of limiting the sale to such as take out licenses therefor.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Reconstruction of Dry Cleaning Establishment.

January 27, 1927.

MR. JOHN PLANT, Chief Fire Prevention Engineer.

Dear Sir:

This will acknowledge receipt of your letter of January 21st relative to the making of certain changes or alterations in a dry cleaning establishment at 10106 Parnell avenue.

It is proposed to move the present benzine room to the present dry room; to move the present dry room to the present pressing room; and to move the present pressing room to the present benzine room. The size of the present benzine room is $18\frac{3}{4}$ feet by $12\frac{1}{2}$ feet, while the size of the proposed benzine room when these changes are made will be 21 feet by $18\frac{3}{4}$ feet.

There has been presented to this department an affidavit from Christine Schmidt to the effect that she is the owner of the said dry cleaning establishment at 10106 Parnell avenue and that the said business was established there by her prior to July, 1912. It is also represented that the dry cleaning establishment which existed in July, 1912, was partly burned down; that this partly burned down structure was in 1919 converted into the present structure. When the establishment was so converted or reconstructed in 1919 it did not conform to the 50-foot clearance provision which was then in effect and it does not conform to the 25-foot clearance provision which is now required of new dry cleaning establishments.

“Under the proposed plan of changes,” you state, “the benzine room would be installed at least 20 feet further away from an existing frame building and will be constructed on the alley line. However, there will be no open space on three sides of the benzine room and on two sides of the dry room. There is 25 feet of open space only on one side of the dry room.”

The premises upon which this dry cleaning establishment is located are placed by the Zoning Ordinance in an Apartment District. A new dry cleaning establishment may not be permitted in an Apartment District, and the present establishment there existing is a non-conforming use. It may be continued under the Zoning Ordinance, but it may not be extended, and it may not be reconstructed or structurally altered to an extent exceeding in aggregate cost, during any ten-year period, 50 per cent of the value of the building.

The question presented is whether you should approve the plans for the alterations even though they do not show compliance with the 25 feet clearance provision of the Dry Cleaning Ordinance.

Paragraph (f) of the new Dry Cleaning Ordinance of May 26, 1926, differs from the old Dry Cleaning Ordinance in that the new ordinance expressly permits buildings in which a dry cleaning business was carried on prior to July 22, 1912,

"to be altered or rebuilt," without compliance with the 25 feet clearance provision, and reads as follows:

"(f) Every such building shall be detached and at least twenty-five feet from any other building or structure or to the line of adjoining property which may be built upon; provided, however, that the use of any building in which a dry cleaning business was carried on prior to July 22, 1912, may be continued where such building is separated from all other buildings by a fire wall, with no openings into any adjoining building; *and further provided, that such buildings shall be permitted to be altered or rebuilt if all the regular building requirements are complied with*, and provided, further, that any building used for dry cleaning purposes but not so occupied or used for such purposes for a period of three consecutive months shall not again be used for the business of dry cleaning unless all requirements governing new buildings or dry cleaning plans have been complied with."

To "alter" as applied to buildings means a change or substitution in a substantial particular in one part of a building for a building different in that particular; a change or changes within the superficial limits of an existing structure. (2 Corp. Juris., page 1156.) To "rebuild" means to build up again; build or reconstruct after having been demolished; reconstruct or reconstitute; as, to rebuild a house. (Century Dictionary.)

The City Council in using the above language had in mind, we think, the fact that there are in Chicago some dry cleaning plants established before the enactment of the fire prevention ordinance of July 22, 1912, which, because of their antiquated construction, surroundings or methods, may be very dangerous at the present time from the standpoint of explosion or fire. It recognized that situations might arise because of changes in processes, new methods of operation, new buildings or otherwise in which it would make for better fire prevention and reduce the fire hazard to permit dry cleaning establishments in existence before July 22, 1912, to be altered or rebuilt, provided they complied with the regular

building requirements and without requiring their compliance with the 25 feet clearance provision. And it was to take care of these cases that the City Council inserted in the dry cleaning ordinance of May 26, 1926, the new provision that "such buildings may be permitted to be altered or rebuilt if all the regular building requirements are complied with."

The proposed alterations will mean a slight increase in size of the benzine room though as we understand it there is to be no increase as regards the entire building, but merely a rearrangement of the rooms. This rearrangement of the rooms will also mean that the benzine room will, as planned, be 20 feet further away from an existing frame residence than it is at the present time, and the benzine room as proposed will hereafter have an entrance upon a public space, which it has not at the present time. These matters we infer should decrease the fire hazard. We therefore see no objection to the structural changes desired, provided they comply with all the requirements of all the ordinances except the 25-foot clearance provision and unless in your opinion it would mean an increase in the fire hazard.

We call your attention, however, to the fact that this non-conforming use may, under the Zoning Ordinance, be continued, but it may not be extended, and that it may not be reconstructed or structurally altered to an extent exceeding in aggregate cost, during any ten-year period, 50 per cent of the value of the building.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Permit for Distilling Plant of Western Shade Cloth Company.

January 28, 1927.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

This will acknowledge receipt of your communication of the 20th instant in reference to the Western Shade Cloth Company, located in the vicinity of Jefferson and 21st street. You enclose with your communication a letter you received from Tatge & Tatge, lawyers, representing the Western Shade Cloth Company, setting forth their contentions in this matter.

It is our understanding that the Western Shade Cloth Company now manufacture artificial leather in their building on the eastern side of the alley between Jefferson and String street. That they propose to erect a building across the alley and install therein an equipment for the purpose of reclaiming solvents from their artificial leather plant.

You have refused to approve the plans for the erection of the proposed building primarily because there is not 150 feet of open space on all sides of the location of the proposed building as provided for in Section 2329 of Article V of Chapter 41 of The Chicago Municipal Code of 1922 (Inflammable Liquids).

Section 2329 is as follows:

“2329. *General application — location of plants.*) The liquids for which the regulations are prescribed in this article shall be understood to include liquids of petroleum and liquids drawn from natural gas classified as in Section 2277 of Article 1 of this chapter.

No permit shall be granted for the establishment of a new plant or an addition to any existing plant for distilling or condensing within the limits of the City until

after a survey shall have been made by the Chief of Fire Prevention and Public Safety and an investigation made of all hazardous conditions connected therewith. If there are no schools, churches, hospitals or public halls within three hundred feet and no other buildings, except those of the plant, within one hundred fifty feet of the proposed distilling or condensing plant, the Chief of Fire Prevention and Public Safety shall grant a permit for the location desired; provided, that the applicant shall guarantee to maintain *an open space one hundred fifty feet wide on all sides thereof.*

Section 2277 referred to in Section 2329 is as follows:

“2277. *Classification.*) For the purpose of this chapter, inflammable liquids are divided into four classes, according to the flash point, as follows:

Class 1. Liquids with flash point below 25 degrees Fahrenheit (—4 degrees centigrade), closed cup tester.

Class 2. Liquids with flash point above that for Class 1 and below 70 degrees Fahrenheit (21 degrees centigrade), closed cup tester.

Class 3. Liquids with flash point above that for Class 2 and below 187 degrees Fahrenheit (93 degrees centigrade), closed cup tester.

Class 4. All liquids with a flash point above that for Class 3.

The flash points shall be as determined with the Elliott, Abel, Abel-Pensky, or the Tag closed cup testers, but the Tag closed cup tester (standardized by the United States Bureau of Standards) shall be authoritative in case of dispute. All tests shall be made in accordance with the methods of tests as adopted by the American Society for Testing Materials.

Representative examples of the classes of inflammable liquids are:

Class 1. Ether, carbon bisulphite, gasoline, naphtha, benzole, collodion, hydrocarbon (gas drips), liquefied petroleum gas, acetone.

Class 2. *Alcohol*, amyl acetate, *toluol*, *ethyl acetate*, methyl acetate.

Class 3. Kerosene, amyl alcohol, turpentine, whiskey, brandy.

Class 4. Fuel oil.”

You inform us that the "process of reclaiming solvents to be inaugurated by the Western Shade Cloth Company in their proposed building requires the recovery of vapors of various volatile liquids. These vapors are then condensed and brought back to their original state which is toluol, ethyl acetate and alcohol. *This process constitutes a distilling and condensing process.*"

You further advise us that "this procedure is considered hazardous; there have been several fires at this location; there have been men burned and killed at this location by some of these fires; the possibilities for a disastrous explosion and fires are always present regardless of how well regulated the process may be; a former Chief of the Fire Prevention Bureau recommended that this establishment be moved out of the City."

The Western Shade Cloth Company state that in the manufacture of artificial leather as now carried on by them, "a solution composed essentially of toluol, ethyl acetate and alcohol with various proportions of castor oil and coloring matter is spread upon the surface of cloth and dried." (In your letter you demur to this statement and declare, "they state * * * all the materials used in the manufacture of artificial leather * * *. However, they state that 'a solution composed essentially of toluol, ethyl acetate and alcohol, with various proportions of castor oil and coloring matter, is spread upon the surface of the cloth and dried.' They do not state that other material such as soluble gun-cotton (nitro-cellulose) is one of the principal constituents of this alleged solution." It can be stated, without any doubt, that the ingredients mentioned in Tatge & Tatge letter will not and cannot make artificial leather.)

The Western Shade Cloth Company further state that the process of manufacturing artificial leather is carried on in a so-called coating machine wherein the cloth is subject to a blast of warm air merely for the purpose of carrying off the solvent in a form of vapor and drying the cloth to commercial conditions. This product carried off, at 140 degrees F.,

consists of 2.72 parts of vapor and 97.28 parts of air. That the vapor from this process is discharged into the open air, but it has been found that the bulk of the solvents used in the processing pass off in this vapor, so that it has been desirable to salvage these solvents if commercially possible, and with this thought in mind, the Western Shade Cloth Company has arranged with the American Solvent Recovery Corporation for an installation and operating license covering a process which it is believed will salvage these solvents. This process of the American Solvent Recovery Corporation, in the main, consists of passing the exhausted vapor from the coating operations through a bed of activated carbon. This carbon has the property of absorbing a very considerable proportion of gas and holding them in suspense indefinitely and that the cycle of operations is as follows:

“The vapor is passed through the one machine (in the operation of their processing two large machines are used, known as absorbers, but one machine only is in use at a given time) until the point of saturation in its carbon bed has been nearly reached, at which time the inflow of gas is diverted in a second machine. Live steam is then admitted to the first machine, raising the temperature of the carbon bed above the point necessary to discharge the absorbed vapors of the carbon bed. These are then carried through a series of *condensers* which take out the water and *condense* the solvent which is in the form of a solution made up of the three components already mentioned. This *condensate* is then separated by gravity, *redistilled* to rid it of the remaining water and return to the regular process in the artificial leather department.”

The Western Shade Cloth Company claim that:

(1) Because of this process of the American Solvent Recovery Corporation that the proposed plant should not be considered as a “plant for distilling or condensing and that since this process is not the ordinary process of condensation, that it is not within the provisions of Section 2329,” and further,

(2) That since Section 2329 declares "the liquids for which the regulations are prescribed in this Article shall be understood to include liquids of *petroleum* and liquids drawn from natural *gas* classified as in Section 2277" and as the liquids in question ("a solution composed essentially of toluol, ethyl acetate and alcohol") do not include liquids of petroleum and liquids drawn from natural gas, that portion of Section 2277 stating "Class 2, alcohol, amyl acetate, toluol, ethyl acetate, methyl acetate" should be disregarded and not considered as having any application or force in this instance.

(3) And further, that because in the case of *Klever Karpel Kleaners, Inc. v. City of Chicago*, 323 Ill. 368, the Supreme Court held that the dry cleaning ordinance was valid except the provision requiring the building to be detached 50 feet from any other building,

that the Fire Prevention Bureau should grant the Western Shade Cloth Company the application that they desire for the erection of their proposed solvent recovery plant.

From what has been set forth above, especially the language of the applicant, it is our belief that the process constitutes a distilling and condensing process and as such is regulated by the provisions of Section 2329 of The Chicago Municipal Code.

As to the question of whether or not Section 2277 of The Chicago Municipal Code applies because of this language in Section 2329: "This article shall be understood to *include liquids of petroleum and liquids drawn from natural gas* classified as in Section 2277," it is our opinion that since Section 2329 specifically refers to Section 2277, that both of these sections should be read together and because of the fact that Section 2277 specifically sets out "toluol, ethyl acetate and alcohol," that Section 2329 necessarily means that the liquids for which the regulations are prescribed in it shall be understood to include liquids of petroleum and liquids drawn from natural gas and also the various liquids set forth in Section 2277, amongst which are "toluol, ethyl acetate and alcohol."

Concerning the decision in the case of *Klever Karpel Kleaners*, we cannot understand that it has any special bear-

ing on the question before us. However, since it is urged, it is well to note that the court states, on page 374:

"It is clearly within the police power of the city to provide by ordinance for the regulation and prevention of the storage of coal oil, naphtha, benzine, petroleum, or any of the products thereof, *and other combustible or explosive material*. (*Standard Oil Co. v. City of Danville*, 199 Ill. 50.) Such regulation may properly include the provision of methods of installation and use of tanks for the handling and storage of volatile inflammable liquids therein, pumps or devices for the removal and conveyance of the contents of such tanks, and where, in a building in which such liquids are stored, a business is conducted in connection with which such liquids are used, the regulation may include provision for the lighting and ventilation of the building, *the manner of construction * * **"

If the requirements of an ordinance regulating the construction and use of buildings for the protection of the lives and safety of citizens as well as their property against fire are adapted to the purpose of securing such protection, the court cannot interfere with their enforcement unless they are manifestly unreasonable. The extent to which the public safety requires the construction of buildings and the conduct of business therein to be regulated and the method of such regulation, where such regulation is committed by the Legislature to a city, are questions which are left to the judgment and discretion of the City Council to determine, and unless the exercise of such judgment and discretion is manifestly unreasonable, the courts will not interfere with it. A court will not hold an ordinance void as unreasonable where there is room for a fair difference of opinion on the question, even though the correctness of the legislative judgment may be doubtful and the court may regard the ordinance as not the best which might be adopted for the purpose. *Hartman v. City of Chicago*, 282 Ill. 511; *City of Chicago v. Mandel Bros.*, 264 id. 206; *City of Chicago v. Washingtonian Home*, 289 id. 206."

In view of the fact that the proposed solvent recovery plant which the applicant desires to erect does not contain "an open space of 150 feet wide on all sides thereof," and since it is "a new plant * * * for distilling or condensing

within the limits of the City" and "the possibilities for a disastrous explosion and fires are always present regardless of how well regulated the process may be," it is our opinion that you have acted rightfully in denying the application of the Western Shade Cloth Company.

Very truly yours,

BARNET HODES,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Letting of Contract for Changing of Tracks and Building Trestle at House of Correction.

January 31, 1927.

HON. RICHEY V. GRAHAM, Superintendent of the House of
Correction.

Dear Sir:

We are in receipt of your letter of recent date in which you enclose copy of an estimate submitted to you by the Central Contracting Company for the work of changing the tracks and building a new trestle so that cars which now come in through the site of the new county jail will come in at the south end of the grounds of the House of Correction. You ask to be advised with reference to this proposal and the awarding of the work.

From the answer you gave to the question of the writer it appears that you have not advertised for bids and that the estimate you submitted is informal. We, therefore, beg to advise you that it will be necessary for you to proceed formally before the contract can be let.

The law contemplates that the House of Correction in letting a contract of this character is bound by the same rules as the other branches of the government of the City of Chicago. It will be necessary to advertise and to let the contract to the lowest responsible bidder.

The Appropriation Bill authorizes the Board of Inspectors to enter into the contract. Section 50 of The Chicago Municipal Code of 1922 provides that they must proceed in the same manner as is provided for the letting of contracts of the Department of Public Works. The provisions for letting contracts in the Department of Public Works appear in Sections 3260 to 3275 of the code. In so far as they are applicable, the provisions must be lived up to. The advertising must be for ten consecutive days. We suggest that, if you are not familiar with the routine in this respect, it would be well for you to consult with the contract clerk in the Department of Public Works. He would probably be able to give you a great deal of information that you will require as to specifications, plans, etc., and he will perhaps be able to give you forms of contracts and bonds which can be remodelled to suit your needs. All this can be done in case you are not in the habit of making contracts of this character. It may be, however, that you let contracts for materials and supplies in such a way that you can use the forms that are applicable thereto. When you have awarded the contract and drafted same it should be submitted to the Law Department for approval as to form.

If we can be of further assistance to you in the matter of drafting such contract or otherwise we are ready to give you such further advice and guidance as may be necessary.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

House Boats Moored in Chicago River.

February 3, 1927.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

This is in reference to your communication relating to house boats which are tied up at random in the harbor. It appears from your letter that the house boats are, for the most part, occupying private lands, and that the owners of these lands have requested you to take steps to have the boats removed. It further appears that the house boats are an impediment and a menace to navigation.

Section 1690 of The Chicago Municipal Code of 1922 provides:

“The harbor shall consist of the Chicago River and its branches to their respective sources and all slips adjacent to and connecting therewith, the Ogden Canal, the Calumet River and its branches, and all slips connecting therewith, the waters of Lake Calumet and all slips and basins connected therewith and all piers, breakwaters and permanent structures therein, the Drainage Canal and all piers and basins, and the waters of Lake Michigan, including all breakwaters, piers and permanent structures therein, for a distance of three miles from the shore between the north and south lines of the City extended, to the extent that the above named waterways are within the territorial limits of the city of Chicago * * *. The words vessels, crafts, and floats shall be deemed to include every kind of sailing, steam or other vessel lying or floating in, or navigating the harbor.”

There are three bodies charged with the supervision, regulation and protection of the Chicago Harbor, to wit: The War Department of the United States; the State Department of Purchases and Construction, and the Commissioner of Pub-

lic Works of the City of Chicago. (Opinions of Corporation Counsel, 1923, pp. 255, 258; Smith-Hurd Ill. Revised Statutes 1925, Ch. 127, Sec. 50A, 13.)

The City of Chicago—subject to such restrictions as either the Federal or State government may see fit to impose—has as full power and authority over the harbor as it has over the streets and public grounds of the city. The harbor is a public and navigable highway. One is a highway for pedestrians and vehicles, and the other is a water highway for vessels and other craft, and the privileges and rights of abutting property owners in both cases must be determined by the same laws. (Opinions of Corporation Counsel 1897, p. 330.)

Under Section 1690 of The Chicago Municipal Code of 1922 the control of the harbor is placed in the harbor master, “under the supervision and according to the directions of the Commissioner of Public Works.” Section 1739 of the Code provides a penalty in the case of any person who permits “any unwholesome substance” to fall into the harbor. Sections 1742, 1743 of the Code authorize the Harbor Master to remove any vessels or to change their locations for the purpose of facilitating navigation. Section 1745 of the Code provides:

“The harbor master shall give such orders and directions relative to the location, change of place or station, manner of moving or use of the harbor of or by every vessel, craft or float lying, moving, or laid up in the harbor, as may be necessary to promote good order therein * * *.”

In the case of *McLean et al. v. Mathews* (7 Ill. A. 599), an action of trespass was brought by Mathews for the taking from the Chicago river, a canal boat and towing it into the lake where it was set adrift and lost. The defendants were acting under the instructions of the Board of Public Works of the City of Chicago. The judgment of the trial court in favor of the plaintiff was reversed. The court found the

boat in question was a public nuisance, and an obstruction to navigation. The court states, p. 602:

“It is the settled principle of the Common Law that whatever obstructs travel in public highways and navigable streams is a common or public nuisance, which may be removed and abated.”

It is clear the Commissioner of Public Works, or his agent, the Harbor Master, may remove such boats in the harbor as constitute a nuisance or obstruct navigation. The question as to what constitutes a nuisance, in each particular case is for the jury to decide ultimately.

In 1897 (Cahill's Statutes 1925, Ch. 38, Sec. 558), the Legislature passed an act, known as the Shanty Boat Act of June 10, 1897, which made it unlawful for any person to occupy any boat or water craft upon any navigable river or lake, “as a residence, or for the purpose of engaging in any business, trade or traffic, for any purpose whatsoever, without first obtaining from the clerk of the County Court * * * a license.” A penalty of a fine or imprisonment for a violation of the act is provided. As this is a state act, the enforcement of its provisions is within the jurisdiction of the state's attorney's office. The question of obtaining the co-operation of the state's attorney in the enforcement of the act is a practical one which is within the sphere of your sound discretion.

It is within the power of the City Council to incorporate the provisions of the Shanty Boat Act into the form of an ordinance, provided the penalties as set forth in the ordinance do not exceed those of the Law of 1897. With such an ordinance in effect, the City Prosecutor's office would have authority to co-operate with the Harbor Master in making the Shanty Boat Act provisions effective.

It is recommended that, whenever possible, notice be served upon the owner of a boat before taking any further steps looking toward its removal. It is further recommended that if the serving of notice is found to be impracticable, or is ignored when served, and you or your agent decides upon

a boat's removal, that the boat be removed to such place as may be found where the boat will not obstruct navigation.

Yours truly,

EDWARD M. QUINN,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

Status of Undertaker's Assistant.

February 6, 1927.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.

Dear Sir:

This is in reference to your request concerning Section 1906 of The Chicago Municipal Code of 1922.

You ask: "Is an undertaker, legally licensed by the City of Chicago to conduct the business of undertaker at and from a single store, legally entitled, if he so desires, to have such store operated or conducted for him by a duly licensed assistant?"

The foregoing question is answered in the affirmative. The section of the code referred to makes clear the necessary conditions that apply to an agent or assistant in charge of an undertaking room or place or taking part directly in the management of the work of an undertaking establishment. There is nothing in this section or in other sections of the code which prohibits a licensed undertaker from employing a licensed assistant to conduct the undertaker's main place of business, as distinguished from his branch offices.

This opinion is not to be construed as relieving the undertaker of the necessity of securing a separate undertaker's

license for each of his places of business as provided by Section 1905 of the Chicago Code.

Yours truly,

EDWARD M. QUINN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Use of Seminary Avenue by Railroad Company for a
Team Track.**

February 7, 1927.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

This is in reference to your communication concerning the right and legality of the use of Seminary avenue between Grace and Byron streets by the Chicago, Milwaukee and St. Paul Railway Company for a team track.

Under date of May 31, 1924, the Corporation Counsel rendered an opinion on the aforesaid matter—to which opinion you are referred (Opinions of Corporation Counsel, Vol. of 1924-5, p. 99). Since the delivery of this opinion it does not appear that there has been any change in the legal status of the land in question. The Corporation Counsel was of the opinion that the railroad company was unlawfully using the particular streets for its right-of-way.

Unless the street is used in such a manner as to constitute a nuisance, there is no action which your department could take with reference to the complaint of Mr. McLean, a resident on Alta Vista Terrace. The question, when a thing may or may not be a nuisance, must be settled as one of fact and not of law. (Opinion of Corporation Counsel, February 9, 1926, No. 1347.)

It is provided by Ch. 24, Art. 5, Section 60, Illinois Revised Statutes (Cahill) 1925, that the City Council shall have power:

“To prevent, and suppress * * * noises, disturbances * * *; To declare what shall be a nuisance, and to abate the same. * * *”

And Section 56, Paragraph 143, Ch. 38, Illinois Revised Statutes (Cahill) 1925, provides:

“Whoever wilfully disturbs the peace and quiet of any neighborhood or family, by loud or unusual noises * * * shall be fined not exceeding one hundred dollars.”

The City Council enacted an ordinance providing that “all persons who shall make, aid, countenance or assist in making any improper noise, riot, disturbance, breach of the peace * * * shall be deemed guilty of disorderly conduct.”

It is clear that the use of the streets in question by teamsters in the ordinary course of their usual business—although annoying noises arise from such use—does not constitute a nuisance *per se*. However the ordinance and statute above referred to are, in the opinion of the Corporation Counsel, broad enough in their terms to justify the abatement of the annoyances in question, if, under the facts, any improper or unusual noises exist. This presents a question of fact, and consideration should be given the volume of sound, the location and time of night, the population and physical surroundings. Prosecutions may be instituted either by filing all information in the name of the People under the statute, or by complaint on behalf of the City of Chicago under the ordinance.

Yours truly,

EDWARD M. QUINN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Revocation of Signatures on Independent Petition.

February 7, 1927.

HON. AL F. GORMAN, City Clerk.

Dear Sir:

Replying to your letter requesting our opinion as to the duty of the City Clerk in the matter of requests by signers of petitions that their names be revoked, would state your letter sets out the following facts:

“On Saturday, January 29th, 1927, at 9:45 A. M., John Dill Robertson filed a petition in the office of the City Clerk as an independent candidate for the office of Mayor of the City of Chicago, to be voted on at the election of April 5, 1927.

“Since the filing of said petition, several requests by persons who signed the petition have been made in writing, asking that I revoke the names of the said persons from the petitions.”

Section 293 of an act to provide for the printing and distribution of ballots at public expense, and for the nomination of candidates for public offices, to regulate the manner of holding elections, and to enforce the secrecy of the ballot (approved June 22, 1891, L. 1891, p. 107), contains the following language:

“Said petition when filed shall not be withdrawn or added to and no signature shall be revoked except by revocation filed in writing with the clerk with whom the petition is required to be filed *and before the filing of such petition.*”

The language of the statute is plain and unambiguous and in our opinion is mandatory, and the City Clerk has no

power to revoke names from petitions unless so requested by the signer in writing before the petition is filed

Respectfully submitted,

EDMUND L. MULCAHY,
Second Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Restoration to Payroll by Mandamus.

February 8, 1927.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

Answering your inquiry how to proceed "so as not to be in violation of a court order," we would say, do just what the writ of mandamus commands in terms of the language therein used.

Your question No. 1, "Is it my duty to send for the man and reinstate him before I receive orders from the Civil Service Commission or will the Civil Service Commission order him placed back upon the payroll?" must be answered, no. Do just what the court orders and wait for no one.

You submit the following: "Question No. 2. In case this man cannot report back for duty, am I within my rights and is it my duty after reinstating his name to the payroll for the time specified in said writ, to suspend him for failure to report for work and file charges with the Civil Service Commission?"

The writ plainly commands that August Honomichl be placed back on the payroll not only "for the time speci-

fied," but to remain there until *lawfully removed*. It would be just as illegal under the facts of this case disclosed by the files in your office, to suspend this fireman immediately after reinstating him to the payroll, as it was to take his name off the payroll, for suspension cannot be sustained unless lawful cause therefor exists. It is no cause for suspension, nor is it a proper ground for charges before the Civil Service Commission, merely that a disabled fireman fails to report for work. Indeed a disabled fireman is quite naturally one who is presumed to be unable to report for work, and that is just the fireman that the City Council, by Section 1199 of the Municipal Code of 1922, declares shall be entitled to remain on the payroll and draw his regular salary for a period of twelve months during a disability that arises out of the service. To suspend in this case as you suggest might subject you to the charge of contempt of court for illegally doing by indirection what the court has just held was unlawful to do directly.

If you will closely follow the procedure which the Corporation Counsel's office has clearly and fully outlined in the letter to you of date February 4, 1927, as legal in this case and all similar cases, you may rest assured that no fireman can justly charge that his rights are being violated, and you will be acting within the scope of your authority under the existing Civil Service Act and the rules of the Civil Service Commission adopted pursuant thereto.

Very truly yours,

FRANCIS J. VURPILLAT,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Classification of Buildings in Connection with Garage Frontage Consents.

February 9, 1927.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

This will acknowledge receipt of your letter of February 7th.

On November 17, 1926, your department issued a permit for the erection of a public garage and showroom at 446-452 E. 111th place. You wish to be advised in relation to the propriety of issuing such permit and particularly whether frontage consents should have been required before the issuance thereof.

In addition to the information concerning the conditions there which are set forth in your letter, we have had a plat prepared, showing the property upon which it is proposed to erect this public garage, as well as the surrounding premises.

The plot upon which the public garage is to be erected is placed by the Zoning Ordinance in a commercial district and is across the street on Eberhart avenue from a manufacturing district. A public garage is expressly permitted in a commercial district; so that as far as the Zoning Ordinance is concerned there could be no objection made to the erection of the proposed garage.

But Section 929 of The Chicago Municipal Code of 1922, as amended June 30, 1926, requires frontage consents before a permit may be issued for the erection of a garage in a block in which dwelling houses, apartment houses and hotels constitute one-half or more of the buildings on both sides of the street in the block, and said Section 929 reads as follows:

“* * * nor shall any person, firm or corporation hereafter locate, build, construct or establish any garage in the city, on any lot in any block in which dwelling houses, apartment houses and hotels constitute one-half or more of the buildings on both sides of the street in the block, or within one hundred feet of any such street, in any such block without the written consent of a majority of the property-owners according to frontage on both sides of the street; provided, that all lots which abut only on a public alley or court shall be considered as fronting on the street to which such alley or court leads. *It shall not be deemed inconsistent with the character of a building as a dwelling house, apartment house or hotel under this section that a part thereof is used for retail business purposes, if a separate part of such building with a total floor area greater than the floor area used for business, is used for residence purposes. Frontage consents, when required under this section, shall be obtained and filed with the commissioner of buildings before a permit is issued for the construction of any such building; provided, that in determining whether dwelling houses, apartment houses and hotels constitute one-half or more of the buildings on both sides of the street in any block, any building fronting upon another street and located upon a corner lot shall not be considered; and provided, further, that the word ‘block’ as used in this section shall not be held to mean a square but shall be held to embrace only that part of the street in question which lies between the two nearest intersecting streets.*”

A block, it will be noted, under this section “shall be held to embrace only that part of the street in question which lies between the two nearest intersecting streets.”

It will also be noted that the above section also provides that “in determining whether dwelling houses, apartment houses and hotels constitute one-half or more of the buildings on both sides of the street in any block, any building fronting upon another street and located upon a corner lot shall not be considered.”

The proposed garage is to be erected on the corner of Eberhart avenue and 111th place. It is therefore necessary

that we consider the buildings which existed at the time of the issuance of the permit in the block on 111th place between Eberhart avenue and Vernon avenue and on Eberhart avenue between East 111th street and East 111th place.

Let us first consider the situation on 111th place between Vernon avenue and Eberhart avenue. At 431 East 111th place there is a three-story apartment building, but this could not be considered under the terms of the ordinance in determining whether dwelling houses, apartment houses and hotels constitute one-half or more of the buildings on both sides of the street because it fronts another street (Vernon avenue) and is located upon a corner lot.

At 439-441 East 111th place there is a three-story apartment structure. This structure, you suggest, is connected by a porch with the building which fronts on Vernon avenue. Whether, however, the apartment structure at 439-441 East 111th place should be regarded as part of the apartment building which fronts on Vernon avenue, and therefore need not be considered for the purpose of determining whether frontage consents should have been obtained in this block, is unimportant in the view we take of the matter. Even assuming that the apartment structure at 439-441 does front on 111th place, as we see it, frontage consents would not be required.

At 447-453 East 111th place there is a large public garage which is immediately across the street from the proposed public garage for which you have issued a permit.

At 452 East 111th place, on the frontage where the public garage is to be erected, there is an existing frame building at the corner of the alley which fronts on East 111th place. The building is used as a place for newspaper distribution.

From the above, it is our opinion that no consents should have been required on East 111th place, as there are only three buildings there which could possibly be taken into consideration under the above ordinance. One is an apartment structure at 439-441 East 111th place, assuming it should

be considered, and the other two are buildings used for business, to wit, a public garage and newspaper distribution station; so that one-half of the buildings in said block are not used for the purpose of dwelling houses, apartment houses and hotels within the meaning of the above ordinance, and therefore no frontage consents should have been required on East 111th place.

When we come to the situation on Eberhart avenue between East 111th street and East 111th place, we find that there is a three-story building at 451-453 East 111th street containing stores and apartments, but this may not be considered at all as it is on a corner lot and fronts on another street. The same is to be said as to the store building at 461-465 East 111th street, which also is on a corner lot and fronts on another street. Whether the frame business building used by the Illinois Central Railroad Company for a railroad station opposite the Eberhart avenue side of the proposed garage should be considered, it is unnecessary to determine, because upon no possible theory that we know of could frontage consents be required in this case on Eberhart avenue.

The situation presented in this case is, as you state, undoubtedly a peculiar one. The frontage consent ordinance in question, being a derogation of the free use of the property, must be strictly construed. Likewise it must be given a reasonable interpretation in view of all the facts in the case. The premises upon which it is desired to erect the proposed garage are zoned for commercial purposes, are surrounded on three sides by commercially zoned property and on the fourth side by property zoned for manufacturing purposes. In addition, the garage will be directly across the street on East 111th place from a large public garage which exists there at the present time, and will also be directly across the street on Eberhart avenue from the right-of-way of the Illinois Central Railroad.

So far as we are advised in the matter from your letter and from the plat of the territory which we have made,

and a copy of which we are enclosing, we are not disposed to advise you that you were in error in issuing the permit in this case without requiring frontage consents.

Yours very truly,

WILLIAM L. SULLIVAN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Ambulance Service for Police Department.

February 10, 1927.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

This is in reference to request made by you regarding the obligation and authority of your department to provide and maintain an ambulance service.

The City of Chicago has power to establish and maintain an ambulance service to afford emergency relief to persons taken ill or injured on the public streets (Opinions of Corporation Counsel, Vol. of 1923-4, p. 466). It would be within the jurisdiction of the City Council to assign such emergency relief work to your department. However, it does not appear that the City Council has taken any affirmative action in reference to the permanent maintenance of this type of service.

Primarily, the taking care of the indigent sick is a function expected to be performed by the county.

Yours truly,

EDWARD M. QUINN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Liability of Water Fund Employees for Income Tax.

February 11, 1927.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We have your letter in which you make inquiry concerning the status of employees of the City who are paid out of the water fund with respect to the Federal income tax.

You state that your attention was called to a newspaper article which said that Congress had exempted such employees from the payment of the income tax for the year 1924 and prior years, but that it was expressly stated that such exemption did not apply thereafter.

The statement which you attribute to the newspaper is correct, so far as the exemption is concerned, but there is nothing which expressly includes employees in future years. The section of the act reads as follows:

“Sec. 1211. Any taxes imposed by the Revenue Act of 1924 or prior revenue acts upon any individual in respect of amounts received by him as compensation for personal services as an officer or employee of any state or political subdivision thereof (except to the extent that such compensation is paid by the United States Government directly or indirectly), shall, subject to the statutory period of limitations properly applicable thereto, be abated, credited, or refunded.”

From the above it will be seen that as to 1924 taxes and taxes for prior years, if payment was made the employee is entitled to a rebate, and if payment was not made he is not required to make any further return and the tax is exempt.

The act does not state anything, however, with respect to the future tax, and therefore the old question is still open

as to whether or not such a tax can be collected. The Government takes the position that it has a right to collect this tax. We are not making any effort to combat this theory at the present time, because we are informed that the number of city employees who would be affected in the future would be very few, and their past obligations are wiped out. The Government authorities, however, expect all employees that they claim are not exempt to make returns for the year 1925 (which should have been made by March 15, 1926) and subsequent years.

The new law requires returns to be made by every single person whose net income, including salary, amounts to \$1,500, and by every married person whose net income, including salary, amounts to \$3,500. This must be done whether a person is exempt from the tax or not.

You further ask whether it devolves upon the City to furnish employer's reports of payments made to employees. In reply to this, we beg to advise you that the Commissioner of Internal Revenue has ruled that such returns must be made as to each single person having a fixed or determinable income of \$1,500 or more, and as to each married person such income of \$3,500 or more. The commissioner announces that forms 1096 and 1099 will be furnished by any collector of internal revenue for that purpose. Returns for the calendar year 1926 must be made. We do not understand this provision to be retroactive.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Supplemental Opinion on Annuity of Minor Child Whose Mother Is Living.

February 14, 1927.

RETIREMENT BOARD, POLICEMEN'S ANNUITY & BENEFIT FUND.

Gentlemen:

Replying to your request for supplemental opinion in the matter of annuity payable to a minor child whose mother is living, the following is submitted:

Your letter states that Allien Abbott, the minor daughter of Russell P. Abbott, a deceased policeman, who was living with her stepmother at the time Mr. Abbott died, is now with her own natural mother, Mrs. Martha Abbott Hayes.

Your inquiry is as to whether or not under these changed circumstances the pension of \$10 per month for Allien Abbott should now be paid to her mother.

Section 44 of the Policemen's Annuity & Benefit Fund Act contains the following provision:

“Any annuity which shall be granted for the benefit of any child shall be paid to the parent of such child who shall be providing for such child, unless another person shall have been or shall be appointed by a court of law as the guardian of such child.”

I am of the opinion that if Mrs. Martha Abbott Hayes, the mother of Allien Abbott, is now providing for the child the annuity of \$10 per month should be paid to her, as provided in Section 44 of the Act, provided no legal guardian has been appointed for the child.

Respectfully,

GEORGE F. MULLIGAN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Status of Foreign Corporation in Bidding on Work.

February 14, 1927.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

You forwarded to us a letter from the Republic Creosoting Co., under date of February 4, 1927, which contained a copy of an opinion written in this department dated September 8, 1926. You also call attention to our opinion of April 18, 1923; and you ask whether the later opinion is to be understood as superseding the earlier. Both opinions have to do with a foreign corporation which desires to contract with the City, but the earlier opinion covered contracts for work and improvements as well as for materials which can be purchased outright.

From your letter we infer that you regard the two opinions referred to as in direct conflict with each other. We do not believe they need necessarily be so construed, and we will endeavor to explain them. It is true that in our opinion to you we advised you not to enter into contracts on behalf of the City with a foreign corporation that is not licensed to do business in the state; but the opinion is not to be understood as indicating that there can be no business done here by a foreign corporation, since that might lead to an interference with interstate commerce. It may be regarded as definitely advising against such contract so far as work which must be done in the City by the agents or employees of the foreign corporation is concerned.

It is stated by the Republic Creosoting Co., in its letter which called forth the opinion of September 8, 1926, that it makes no pretense of carrying on its business in the State of Illinois, and that what business it does with the City of Chicago is in the nature of an interstate shipment of creos-

sote blocks from Indianapolis to Chicago. In our letter in reply to this we stated that the company was not subject to regulation by the Illinois statutes if it confined its business merely to that.

It is sometimes difficult to determine whether a corporation is actually doing business within the state or not, and it was for this reason that we were precise in stating in two places in the letter in question, that such opinion as we expressed was based on the assumption that the company, as claimed in its communication, was engaged in interstate commerce only. If the company employed agents and workmen here to deliver or to lay the blocks in the pavement it would be doing business within the state.

Assuming now that the company is only engaged in interstate commerce, there is nothing to prevent an order for paving blocks being given to it, any more than there is an obstacle to ordering a book or a typewriter from a concern in New York. In fact, if there was an infraction of the law on account of the company overstepping the bounds, it would be the company's violation of the law and not an offense on the part of the City officer. It might be difficult to enforce a contract entered into with such a corporation, and it would be extremely bad policy habitually to make contracts even for materials with a company that you know is not licensed to do business in this state because of that, but if the company has something to sell which the City wants and cannot get satisfactorily from a natural person or from a corporation licensed to do business here, there is nothing to prevent taking a bid and placing an order thereon for shipment from without the state.

There is a way for a company of this kind to overcome the difficulty that may present itself. That is for such company to let some individual act for it. But as this would be a subterfuge, and not proper or lawful if the company actually does business in the state by this indirect method, we would not want to suggest or encourage that sort of thing. We therefore state again that the whole matter

resolves itself into a question of business policy on the part of the Commissioner of Public Works, with a recommendation that no contract be made with a foreign corporation not licensed to do business here for work or for an improvement of any kind, and none for materials or manufactured articles unless there is some special reason for sending the order outside of the state.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Pension Rights of Matron of House of Correction.

February 14, 1927.

RETIREMENT BOARD, POLICEMEN'S ANNUITY & BENEFIT FUND.

Gentlemen:

Replying to your request for an opinion as to the service credits of a police matron, the following is submitted:

Your letter calls attention to Opinion No. 1277 heretofore submitted on December 11, 1925, and states that since that date information has come to your department to the effect that instead of Mary White having been simply employed as a matron of the House of Correction, she was in fact certified to that position by the Board of Civil Service Commissioners on January 26, 1926; that you have also learned that deductions were made from her salary and paid into the Municipal Employees' Pension Fund.

Your question is as to whether or not the new circumstances as set forth by you affect her pension rights differ-

ently than the situation set out in your application for the former opinion.

The fact that Mrs. White was certified to her position by the Board of Civil Service Commissioners and was thereafter transferred without other and further examination from service at the House of Correction to service in the Police Department, indicates that Mrs. White was originally certified as a result of the civil service examination for police matron, which position was created by an act to provide for the appointment of police matrons, approved May 25, 1897. Assignment to service in the Police Department as a matron could not be made by the Board of Civil Service Commissioners in accordance with the Civil Service Act unless Mrs. White was within the classification of police matron.

The fact that deductions were made from her salary and paid into the Municipal Employees' Pension Fund was undoubtedly due to the fact that the status of police matrons as members of the Police Department and beneficiaries of the Police Pension Fund was not definitely established. The Police Pension Fund Act of 1887 was amended in 1911 so as to include a provision providing pensions for police matrons in the Police Department. This amendatory act was held invalid by the Supreme Court of Illinois in an opinion filed June 21, 1912, rehearing denied on October 3, 1912, in the case of *Lyon v. The Police Pension Board*, 255 Ill. page 139, the court holding, however, that police matrons were part of the Police Department and came within the general scope of the title of the act. It was not until 1921 that police matrons were specifically named as being included within the word "Policemen." (Section 12, Policemen's Annuity & Benefit Fund Act.)

I am of the opinion that Mrs. White is entitled to service credit for the full period of her service as a member of the Police Department from January 26, 1916, and that all deductions made from her salary paid into the Municipal Employees' Pension Fund should be transferred from that

fund to your fund, together with interest thereon at 4%, and placed to the credit of Mrs. White in your fund.

Respectfully,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Right of Reinstatement of Retired Lieutenant of the Fire Department.

February 14, 1927.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

Replying to your request for an opinion relative to the application for reinstatement of retired lieutenant of the Fire Department, I submit the following:

Your letter states that Charles E. Iverson joined the Fire Department on March 30, 1906, and resigned on account of health on March 21, 1926; that your records show that he was born June 18, 1879, and that he was therefore not quite 47 years of age at the time of his resignation; that under the provisions of the Firemen's Pension Act he has paid into the treasury of the Firemen's Pension Fund the required percentage of salary he received at the time of his resignation and will continue to do so until he reaches the age of 50 years, at which time he will become entitled to a pension of one-half of his salary; that the said Charles E. Iverson now desires to be reinstated to his former position as lieutenant.

Your question is whether or not your approval of his application for reinstatement will work an injustice to the

Pension Board or to any one, and whether you are acting within your rights in such approval.

There is nothing in the Firemen's Pension Fund Act that denies to a fireman the right to rejoin the department after having retired following 20 years of service.

If Mr. Iverson should be permitted to withdraw his resignation and thereupon be reinstated to his former place on the civil service roll, he would thereupon become entitled to reinstatement in the Fire Department in the rank held by him under civil service.

As to your suggestion relative to Mr. Iverson being required to sign some stipulation requiring him to work for a reasonable length of time before becoming eligible for a pension at the increased salary rate, I can see no reason why such a stipulation can not be required as a condition precedent to your approving his application for the withdrawal of his resignation.

Respectfully,

GEORGE F. MULLIGAN,

Approved:

Assistant Corporation Counsel.

FRANCIS X. BUSCH,

Corporation Counsel.

Payment of Disability Benefits Due Insane Beneficiary.

February 14, 1927.

THE RETIREMENT BOARD OF THE MUNICIPAL EMPLOYEES' ANNUITY AND BENEFIT FUND.

Gentlemen:

Replying to your request for an opinion as to the payment of disability benefits due insane beneficiary, the following is submitted:

Your letter states that Leonard Weberg, a lineman, applied for ordinary disability benefits on November 3, 1926;

that Mr. Weberg was paid benefits on December 1, 1926; that since that time you have been withholding payment because of the fact that you learned that Mr. Weberg was in the hospital at Elgin, Illinois, supposedly insane; that Mr. P. J. Winsey, an attorney, has written you a certain letter, a copy of which is attached to your letter, requesting arrangement for the payment of these disability benefits without the necessity of appointing a conservator.

In addition to your communication I have also had a conference with Mr. Winsey.

While ordinarily payments could be made only to a conservator, the situation in this particular case justifies a different course, which I believe can be followed without danger or risk on the part of the fund. I understand that Mr. Weberg is not likely to recover his sanity, as he is said to have softening of the brain. I also understand that the amount of disability benefits to which Mr. Weberg will be entitled are not of a very considerable amount. I have also been informed that Leonard Weberg bought a home with his father and mother in joint tenancy, the details being set up in Mr. Winsey's letter, and that payments are due upon said purchase from Leonard Weberg as well as from his father.

I am of the opinion that your Honorable Body would be justified in paying any disability benefits due Leonard Weberg to apply on the mortgage now on the property purchased by him, taking from his father and mother an application that the payment be so made and indemnification from them to your Honorable Body indemnifying the fund against loss or expense by reason of such payment. This would save the employee the great burden of the cost of a conservator and would not expose your fund to financial loss.

Respectfully,

GEORGE F. MULLIGAN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Tapping Sewer and Water Mains to Serve Property Outside of City.

February 16, 1927.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

Your letter of the 3d inst., setting out two orders of the City Council passed January 19, 1927, directing your department to issue permits to one August Kulczy to tap the sewer and water mains at E. 106th street and Indianapolis avenue for the purpose of serving property outside of the City, and requesting an opinion as to the legality of the orders, is received. The property sought to be served is in the state of Indiana.

Our conclusions with reference to the two orders differ and therefore each order will be treated separately. With reference to the order concerning water mains, it is provided that the Commissioner of Public Works be directed to issue a permit to August Kulczy to tap the water main located at the corner of East 106th street and Indianapolis avenue and to install with necessary meter in accordance with existing ordinance a one-inch service pipe to supply the premises at the southwest corner of East 106th street and Indianapolis avenue outside of the City limits. This property is outside of the State as well as outside the City. Section 4 of the Municipal Ownership Act (Paragraph 99, Chapter 111 2/3, Smith-Hurd 1925 R. S.) provides that any city may, without referendum or any authority other than council authority, sell electricity and water within and without the city from any water plant owned and operated by the city. While the water plant of the City of Chicago was not acquired pursuant to the provisions of this act, such provisions are, nevertheless, general in their nature and apply to our water plant, inasmuch as it is owned and operated by the City. This

section, accordingly, gives the City the right to sell water outside of the City limits, and we believe, although not in specific terms, that it authorizes the City to extend its facilities outside of the corporate limits. We do not think, however, that it can be construed to authorize the City of Chicago to do business in its private capacity, or otherwise, in the state of Indiana. The City has only such powers as are given it by statute or such as may be impliedly necessary to carry out expressed powers. It must be presumed that in the passage of the act referred to, the Legislature recognized its own limitations and did not attempt to authorize the City to transact business of any character outside of the State of Illinois. The City therefore cannot legally extend its facilities beyond the state line, nor install water meters beyond the state line. We do think that under the provision of the section above mentioned the City may permit the tapping of the City's water mains for service outside the City and outside the state, providing the point of delivery is inside the state line, and providing the meter or other measuring device is so located as to be subject to the operation of City ordinances and City inspection. If the meter were located on the premises to be served, which are outside of the state, the City could, of course, exercise no power of regulation over it. The point of delivery in such case would be in the state of Indiana, and in so far as the particular service is concerned, the City of Chicago would be subject to the jurisdiction of the Indiana Utilities Commission, and might, if anyone were interested in raising the point, be charged with doing business in the state of Indiana without the authority of that state. We presume it was the intention of the order that a meter should be installed on the property to be served, and that the rate and other provisions of the metering ordinance should be enforced. The City, of course, is without authority to enforce any ordinance in the state of Indiana, and the attempted application of the rate provisions of the meter ordinance to service furnished by the City in the state of Indiana is directly in contravention of the Indiana Utilities Act which gives the Indiana Commission plenary author-

ity to fix and establish public utility rates in that state. If the point of delivery is within the state line and the meter is likewise installed where it would be under the jurisdiction of the City and subject to the provisions of the metering ordinance, we do not see that any objection can be made to this arrangement. The City is plainly authorized to sell water outside of the City but within the state. If the purchaser sees fit to transport it elsewhere for ultimate consumption it is a matter of no concern to the City. We would, accordingly, suggest that the order should be redrafted to comply with the views herein expressed, and if it is so drafted we believe it would be a proper order.

With reference to the sewer connection, this in our judgment stands upon an entirely different foot. The City in this respect exercises a governmental function and not a private function as in the case of water. The exact question presented has heretofore been considered by this office. On July 23, 1923, Mr. Hornstein of this department rendered an opinion to your office on exactly the same point. For your information and guidance we set out herein the full text of that opinion in which we concur. Mr. Hornstein's opinion follows:

"July 23, 1923.

Hon. A. A. Sprague, Commissioner of Public Works.

Dear Sir:

In response to your request for an opinion as to the validity of an order directing you to issue a permit to Walter G. McIntosh to connect a sewer to an existing outlet at Bryn Mawr and Newark avenues, we submit the following:

On its face the order in question, which appears on page 776 of the Journal of the Proceedings of the City Council of July 2, 1923, does not indicate that the subdivision known as Norwood Heights is beyond the City Limits. From a petition which has been presented, and from the copy of your letter to the Mayor which is before us, we learn however that this is a subdivision of about 45 acres and that it is not in the City.

We learn also from the sources mentioned that, as laid out, the subdivision contains more than a mile of

streets; that the Chicago sewer into which it is proposed to drain it is only twelve inches in diameter and barely sufficient to drain the property fronting along Newark avenue which it was designed for; that if a ten or twelve inch sewer were to be connected with it the flooding of basements along the street would result; that a sewer of sufficient capacity to drain an area of 45 acres should have a diameter of 30 to 36 inches; that a ten or twelve inch pipe would be inadequate and would result in flooding the area and the City would be confronted with a serious drainage problem if the subdivision were to be annexed; and that this land is so situated that the owners of the larger part of the section in which it is located will probably also demand drain connections so that the balance of the 640 acres can be drained.

It is further stated that there is a movement on foot to annex the lands lying west of Nagle avenue and south of Bryn Mawr avenue, and that if this is done it will admit of a comprehensive plan of drainage that will serve the whole area without harm to the present City sewers.

From all the information at hand it appears that the action intended by the City Council was not only a matter of great importance, but was also tantamount to making a contract concerning extra-territorial activities, a legislative matter which could only be done by virtue of powers expressly conferred. Such contract as is here proposed can only be made in pursuance of an ordinance, and a mere order on which the record does not even show that there was a roll call is not sufficient.

According to Dillon (Mun. Corp., 5th Ed., Sec. 776), the general doctrine that a municipal corporation cannot usually exercise its powers beyond its corporate limits is relaxed where express or implied power is given, and that in a case where express authority to provide drainage is given without restriction, such power may be exercised to find an outlet for sewage beyond its limits. All the cases which we have been able to discover that bear out this doctrine are ones where the municipality is seeking an outlet for its sewage and surface waters and not where a person on the outside wants to use the municipality's sewers. Hence, there is some doubt in our minds whether such a thing as is proposed here, where City property would be used by the owner of land outside of the limits without compensation, is lawful. But

for the purposes of this discussion we will assume that the rule works both ways, and that with proper legislative action such a contract may be made. The question then arises as to what is proper legislative action.

The authority to do what is here proposed, assuming that it exists, is based on Clause 29, Sec. 1, Art. V, of the Cities and Villages Act, giving the City Council power 'to construct and keep in repair culverts, drains, sewers and cesspools and to regulate the use thereof.' As to the manner of exercising this power, we quote again from Dillon, as follows:

'In *Illinois*, the rule seems to have been adopted that legislative acts must be by ordinance only, and the court seems to found this rule on two features, viz.: (1) the power to enact ordinances, and (2) charter powers conferred upon the common council. Thus, in *Chicago & N. P. R. Co. v. Chicago*, 174 Ill. 439, 446, where these elements concurred, *Magruder, J.*, said: "Acts of the city which have for their object the carrying into effect of charter powers thus granted (by enumeration of the powers which the city council may exercise) are legislative in their character, and it is well settled that acts of municipal corporations which are legislative in their character must be put in the form of ordinances and not of mere resolutions."'

Dillon on Mun. Corp., 5th Ed., Sec. 572-n.

The author cites Illinois authorities in support of his text, some of which bear directly on the subject in hand. Thus, it was held, in *Village of Altamont v. B. & O. S. W. Ry. Co.*, 184 Ill. 47, that by Clause 96 (now 100) of the section conferring powers it is provided that cities and villages may pass ordinances to carry the powers into effect, and that this contemplates the passage of an ordinance whenever legislative action is to be taken which establishes 'a permanent rule of conduct or government' or which is to have 'a continuing force and effect.'

Another quotation directly in point is as follows:

'It has been said that acts of the City which have for their object the carrying into effect of the charter power granted to the city are legislative in their character, and it is well settled that acts of municipal corporations which are legislative in their character must

be put in the form of an ordinance and not of a mere resolution.'

Village of London Mills v. White, 208 Ill. 289.

Such acts as voting the necessary authority to construct drains, to establish grades, etc., have always been held to be legislative acts of such a character as to require ordinances, and mere orders or resolutions will not bind the City.

Clafin v. City of Chicago, 178 Ill. 549.

Paterson v. Barnet, 46 N. J. L. 62.

Creighton v. Munson, 27 Cal. 613.

McManus v. Hornaday, 99 Iowa, 507.

In the case of the order in question, if the direction to the Commissioner of Public Works were a mere executive order it would be valid. But what it amounts to is authority to make a contract with a party concerning territory beyond the limits of the City. It is doubtful whether the issuance and acceptance of the permit without any provision for compensation would amount to a contract, but if not, that fact also, in addition to the fact that there was not the proper form of corporate action, would render the order invalid.

Aside from all we have said above, under the conditions that you describe, you would be justified in hesitating about enforcing even a valid provision if the order had been such. The law is absolutely clear that if, by carrying into effect a provision of this kind, damage is done through overflow, the City would be liable.

City of Ottumwa v. Nicholson, 143 N. W. 439.

(See case note in Neg. and Comp. cases, Annotated, Vol. 6, p. 123.)

Dillon on Mun. Corp., 5th Ed., Secs. 1742-1746.

We are therefore constrained to advise you that the City Council's order is not valid, and that you are not bound to observe it.

Yours truly,

LEON HORNSTEIN,

RUTH C. NELSON,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

We have given every consideration to the subject of this inquiry realizing its importance and believe that the views herein expressed accurately state the law applicable to the orders in question.

Yours very truly,

JAMES J. COUGHLIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Right of Applicant to Have Rear of His Lot Counted
on Frontage Consent Petition.**

February 21, 1927.

MR. JOHN PLANT, Chief Fire Prevention Engineer.

Dear Sir:

This will further acknowledge receipt of your letter of February 8th enclosing a letter from Messrs. Church, Traxler and Kennedy, lawyers, and requesting the views of this department.

You have issued a permit, it appears, to install tanks for gasoline filling station on the rear 95 feet of lot 95 in W. D. Preston's Subdivision. The rear 95 feet of said lot 95 for which frontage consents were obtained and for which the permit was issued has no frontage upon any street.

Section 2279 makes it unlawful to install tanks for the storage of gasoline in any lot or plot of ground without first obtaining the written consents of the property owners representing the majority of the total frontage in feet of any lot or plot of ground lying wholly or in part within lines 150 feet distant from and parallel to the boundaries of the lot or plot of ground upon which said tanks are to be installed.

In their letter Messrs. Church, Traxler and Kennedy state as follows:

"The application for the permit in question describes the ground on which the tanks are proposed to be located as the East 95 feet of lot 95 in W. D. Preston's subdivision. All of lots 95 and 94, however, are under lease as a unit and it will be necessary to locate the building at least on lot 94, and all of both lots will be devoted in general to the business of a gas filling station.

It will be noted that when permit number 14480 was issued, a compliance with §2279 in regard to the frontage consents was sought to be made by using as a part of such frontage consents the frontage of lot 95 itself (on the rear of which the tanks are to be located) and the frontage of both sides of lot 94, this lot being owned by the same party as owns lot 95 and being included with lot 95 in the ground being leased as a unit for the filling station.

Before permitting our client to take over a lease on the premises in question, we would like to request of you the favor of advising us as to whether you regard permit number 14480 as having been properly issued in view of the facts hereinabove stated."

To give a description on the application for the permit and on the frontage consent petition for the premises where the tanks are to be installed as just the rear 95 feet of said lot 95 where the entire lot 95 is owned by one person and where said rear 95 feet has no frontage whatever on any street is, we think, contrary to the spirit and intent of the ordinance.

This is the only instance that has been called to our attention in which the premises upon which the tanks are to be installed have no frontage upon any street and the frontage of a lot is credited upon the frontage consent petition to install tanks on the rear thereof. If this were to be permitted, all an applicant who wishes to install tanks has to do to obtain credit for the frontage of the lot upon which the tanks are to be installed is, in his own description of said premises, to exclude the frontage thereof and in that way

secure credit for the frontage of his own lot upon which the tanks are to be installed. By this means the purpose of the ordinance would be circumvented.

Accordingly we think the permit issued in this case should be revoked.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

Draft of Bill for Housing.

February 21, 1927.

HON. JACOB M. ARVEY, Chairman, Committee on Judiciary.

Dear Sir:

Your committee referred to this department for report and recommendation a proposed order now pending before it which reads as follows:

“ORDERED, That the Committee on Judiciary with the assistance of the Corporation Counsel, be and it is hereby directed to prepare a bill or bills for introduction at the next session of the Illinois State Legislature, which will confer upon the City of Chicago whatever powers are necessary to deal effectively with the housing problem; the power to exercise excess condemnation where public improvements are being installed; the power to alter, remove or demolish buildings which are declared by the Department of Health or Department of Buildings to be unfit or unsafe for human habitation; and the power to install in residence districts such improvements as are necessary to make all dwelling places safe and sanitary.”

You ask that such powers may be conferred on the City as are necessary to deal effectively with the housing problem. Most of the things which are contemplated by the above order are now taken care of; at least, we have ordinances that we are enforcing which cover those things that you suggest, and up to the present time they have not been successfully assailed.

The first thing that you mention is the power to effect excess condemnation where public improvements are being installed. Under the constitution there is no provision made for excess condemnation. In fact, it has always been assumed that excess condemnation was not possible without a constitutional amendment. We have, however, proceeded on the theory that the City of Chicago, under the charter amendment (Article IV, Section 34), can secure for itself, by a vote of the people, the power to condemn additional property. With this in view, we have prepared and are about to submit to the General Assembly a bill authorizing excess condemnation under certain restrictions and limitations which will have to be adopted by the people of Chicago in order to make it effective. Unquestionably the authority to do so will be attacked if we succeed in securing such legislation, but we feel that we have gone as far along this line as is possible under present conditions.

The other two things which you ask for are the power to alter, remove or demolish buildings that are unfit or unsafe, and the power to require dwelling places to be made safe and sanitary. As already stated, we are enforcing ordinances which cover these matters at the present time. The following powers are granted to the City by Section 1 of Article V of the Cities and Villages Act:

“Construction of buildings—Fire escapes.) Sixty-first. To prescribe the thickness, strength, and manner of constructing stone, brick and other buildings and construction of fire escapes thereon.

Fire limits—Defective buildings.) Sixty-second. The city council, and the president and trustees in villages, for the purpose of guarding against the calami-

ties of fire, shall have power to prescribe the limits within which wooden buildings shall not be erected or placed, or repaired, without permission, and to direct that all and any buildings within the fire limits, when the same shall have been damaged by fire, decay or otherwise to the extent of fifty percent of the value, shall be torn down or removed and to prescribe the manner of ascertaining such damage.

Precautions against fire.) Sixty-third. To prevent the dangerous construction and condition of chimneys, fireplaces, hearths, stoves, stove-pipes, ovens, boilers, and apparatus used in and about any building and manufactory, and to cause the same to be removed or placed in a safe condition, when considered dangerous; to regulate and prevent the carrying on of manufactories dangerous in causing and promoting fires; to prevent the deposit of ashes in unsafe places, and to cause all such buildings and enclosures as may be in a dangerous state to be put in a safe condition.

Nuisances.) Seventy-fifth. To declare what shall be a nuisance, and to abate the same; and to impose fines upon parties who may create, continue or suffer nuisances to exist.

Public health.) Seventy-eighth. To do all acts, make all regulations, which may be necessary or expedient for the promotion of health or the suppression of disease."

The above are only some of the clauses delegating powers under which the City has claimed the authority to do what it has done in the matter of prescribing minimum requirements for buildings to promote safety, health, cleanliness and general sanitary conditions.

In order to check up on this we have examined the recently enacted housing laws of the States of Michigan and Iowa, and we find that in a general way our zoning, building and health regulations require those things which are provided for by the housing laws mentioned.

Such being the case, we are unable to make any recommendation for legislation unless your committee will indicate to us what particular things are required which we do not now control by ordinance. There is, of course, no limit to the amount of regulation that may be imposed in the

matter of building dwellings, if authority is granted. In other words, our building regulations might be amplified; our health regulations might be made more drastic; our plumbing code could be enlarged, etc. But for all pressing matters we seem to have sufficient authority to prescribe such regulations as has been deemed advisable. In fact, our building laws, including the requirements as to area, height, ventilation, plumbing, electrical installation, etc., are looked upon as very comprehensive.

We, therefore, have no recommendation to make at present, and will await such suggestions as those who have studied the housing problem may offer in the future before we undertake to make any recommendations.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Licensing of House Boats in Chicago River.

February 24, 1927.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

In reply to your communication addressed to the Corporation Counsel, relative to the proposed "licensing" or issuing "permits" for the operation of water craft in the Chicago river, your attention is invited to the following:

In and by an Act of the General Assembly (Chap. 38, Par. 558, Illinois Revised Statutes), it is provided that it shall be unlawful "for any person to occupy any boat or

other water craft upon the Ohio, * * * or other navigable river, lake or other water course, within this State, as a residence, or for the purpose of engaging in any business, trade or traffic, for any purpose whatsoever, *without first obtaining from the clerk of the county court of the county in which such boat or water craft is to lie or ply*, and such business, trade, traffic or residence is to be carried on, *a license so to do* for each head of a family, for himself and his family, which license shall be granted only upon satisfactory proof of the character of the applicant and the payment of a license fee of five dollars and the clerk's fee for making out such license; * * *."

You will note that the foregoing statute legalizes the use of water craft in navigable waters within this state upon the securing of the license provided in the foregoing section. *The draft of ordinance submitted with our opinion No. 1783 makes no attempt to impose additional regulations, permits or licenses, but puts the City of Chicago in a position to enforce the above license provision without resorting to the state's attorney in case of a violation of the statute. The ordinance merely providing a penalty for operating or maintaining a water craft upon the Chicago river, etc., without first having secured a state license "as provided by law."*

We know of no authority for prohibiting the use and maintenance of water craft on the Chicago river or elsewhere, where the owners thereof have complied with the state and federal regulations governing navigable waters.

We return herewith the draft of the proposed ordinance submitted with your communication.

Respectfully submitted,

ROY S. GASKILL,

Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,

Acting Corporation Counsel.

Distance of Stand-Pipes from Connections.

February 24, 1927.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir :

This will acknowledge receipt of your communications of the 10th and 18th instant in connection with the Midland building to be erected at 168-178 West Adams street by the Duffy-Noonan Construction Company.

You advise us that Section 1300 of The Chicago Municipal Code of 1922 now limits the fire hose which is taken from standpipes in buildings to 75 feet from each standpipe connection. "The reason that this has been limited," you say, "to seventy-five (75) feet is to save confusion and unwinding of hose where quick action is necessary."

You state, "This limitation, however, under the present ordinance, as we construe it, is that the standpipes may be erected in any part of the building so long as seventy-five (75) feet of hose will reach to the most extreme end of the hallways or offices."

You further state that "the policy of your department has been to insist that these standpipes be erected in the stairways because experience has shown * * * that the standpipes are more available to the fire fighters when they are in the stairways and there is less chance of fire occurring in the stairways as there is nothing to burn."

"This policy," you declare, "would require in some instances, that new additional standpipes would have to be erected where the standpipe is more than seventy-five (75) feet from the extreme end of the building, but from a practical fire-fighting standpoint * * * we could change the ordinance to permit the 100 feet of hose, provided the standpipe is in the stairway, and have recommended the amendment of the ordinance to cover this situation."

It also appears from what you state that in the new Midland building there are to be two standpipes installed. If these standpipes are located out in the corridor 75 feet of hose will cover the building in all portions. However, if the standpipes are placed in the stairways then 75 feet of hose will not cover the building. It would in the latter case "necessitate two additional risers and these would be located at the extreme ends of the corridors where there are no stairways."

Consequently, the Duffy-Noonan Construction Company who are constructing the Midland building are in this quandry. If the standpipes are placed at convenient corners of the corridors, 75 feet of hose will reach to the farthest point on the floor as contemplated by the ordinance. If, however, the standpipes and hose racks are placed in the stairwell 100 feet of hose will be necessary to give adequate protection for the floor areas. They are ready, we understand, to comply with either requirement.

You wish to be advised as to whether or not you have the power to consent that leads of 100 feet of hose be permitted or whether the leads of hose should be limited to 75 feet: It being understood that if the leads of hose are permitted to be of 100 feet it will permit the erection of the standpipes in the stairways consistent with your departmental policy, but if the leads are limited to 75 feet, there will be two standpipes installed located out in the corridors.

Paragraph (a) of Section 1300 of The Chicago Municipal Code of 1922 is as follows:

"1300. *Number of standpipes required—when standpipes are not required—permits—fees.*) (a) Standpipes to be provided where called for and except as otherwise specified in this article, shall be of sufficient number that not to exceed 75 feet of hose will be required to reach any portion of the floor."

It is apparent from the reading of this section that the ordinance is very specific, stating expressly "that *not to ex-*

ceed 75 feet of hose will be required to reach any portion of the floor.”

Since the construction company erecting the building in question are ready to comply with the express provisions of the ordinance, although in this specific instance compliance with the ordinance might in a manner differ from compliance with your departmental requirements, it is our belief that your departmental desires should give way to the provisions of the ordinance which require that leads of hose shall not “exceed 75 feet of hose.”

It is therefore our opinion that you do not consent to the installation of the standpipes in the stairways which would permit leads of 100 feet of hose, but require that the standpipes be so placed “that not to exceed 75 feet of hose will be required to reach any portion of the floor.” We are mindful that you have recommended an amendment of the ordinance which would permit 100 feet of hose, but this recommendation cannot at the present time be considered as binding, until such time as the City Council takes action which results in the change of the provisions of Paragraph (a) of Section 1300, we believe that you should be governed by the provisions of this section.

Very truly yours,

BARNET HODES,

Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,

Acting Corporation Counsel.

Supplies for Municipal Court.

February 25, 1927.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

In your letter of recent date you make the following inquiry:

"Can the City Comptroller require the Department of Supplies to disregard any notation on any requisition issued by any branch of the Municipal Court, such as the Clerk of the Municipal Court, for printing, stationery, furniture and office supplies, and also require the Department of Supplies to advertise for bids upon specifications furnished by such branches of the Municipal Court and award the contract to the lowest responsible bidder?"

We assume that your question relates to the method of procedure of the Department of Supplies and whether the provisions of Chapter LXXIX apply to orders for supplies from the Municipal Court or not.

We are of the opinion that the Municipal Court Act contemplates that the court is to be regarded as a branch of the city government. In fact, the Supreme Court indicates as much in the following language:

"Although the powers of government fall into the distinct departments of the legislative, executive and judicial, a municipal government embraces all of them. There is the legislative department, which ordains what the local laws shall be; the executive, charged with the duty of seeing that they are executed; and the courts, in which they are construed, applied and enforced. If an efficient local government was to be established, it was in keeping with that object to regulate the practice and methods of procedure in the municipal court."

People ex rel. Sadler v. Olson, 245 Ill. 288-293.

The Municipal Court Act states that the supplies required by it are to be furnished by the City:

“§7. That all blanks, books, papers, stationery and furniture necessary to the keeping of the records of the proceedings of such municipal court, and the transaction of the business thereof, shall be furnished the officers of such court at the expense of the city. All other expenditures on account of such court which may be authorized by the city council, and which are not specifically mentioned in this act, shall be paid out of the city treasury.”

From the above it appears quite plain to us that the purchase of supplies for the Municipal Court comes strictly within the same rule that applies to every other branch of the municipal government. The ordinances which control the method of procedure as to the various executive departments of the city government apply also to the work done for the legislative department, viz.: the City Council and its committees, and to the judicial department, viz.: the Municipal Court. Under our view of the law an officer of the Municipal Court has no greater right to specify where supplies shall be purchased from than any executive officer of the City, and, therefore, such notations as you speak of may properly be disregarded by the business agent.

Very truly yours,

LEON HORNSTEIN,

Acting Corporation Counsel.

Fire Pumps in Fireproof Buildings.

February 25, 1927.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

This will acknowledge receipt of your letter of February 23d relative to proposed building to be occupied by the St.

Vincent's Asylum at Superior and La Salle streets, and the application thereto of Paragraph (b) of Section 1301 of The Chicago Municipal Code of 1922, which provides among other things that in all fireproof buildings constructed of a greater height than 80 feet a fire pump shall be installed.

Accompanying your letter are two communications from Messrs. Holabird and Roche, architects, in which they contend that the above building is a five-story building measuring approximately 74 feet to the roof. They also state that above the roof there is a pent-house enclosure for tanks and elevator machinery and part of this pent-house is used as an open air solarium.

"In designing this building without a fire pump," they further state, "we feel that we have already acceded to all requirements for a building of this height and character and have actually provided for more fire protection than is called for by any ordinance in effect."

Your letter on the other hand states that the building is a 7-story building and falls within the purview of said Paragraph (b) of Section 1301 in that it is to be constructed of a greater height than 80 feet.

"Sections and elevations through this building," your letter continues, "show that the basement floor is eleven (11) feet two (2) inches below the first floor or ground floor. The ground floor or first floor is seven (7) inches above the established sidewalk level. The second floor is eleven (11) feet above the first or ground floor. The third floor is eleven (11) feet above the second floor. The fourth floor is eleven (11) feet above the third floor. The fifth floor is eleven (11) feet above the fourth floor. The sixth floor is seventeen (17) feet above the fifth floor, and the seventh floor is twelve (12) feet above the sixth floor. On the seventh floor is the solarium. The pent-house floor is ten (10) feet above the seventh or solarium floor. The roof level over a portion of the solarium is ten (10) feet two (2) inches above the seventh floor and the roof of the entire structure is ten (10) feet eleven (11) inches above this point.

"The blue print submitted shows that there is a plan showing a level 108 feet 6 inches which shows a tank nine (9) feet high and eight (8) feet in diameter, as well as the tops of two elevators, one a freight and the other a passenger elevator. There is also shown a floor at the 98 foot 4 inch level which shows elevators, stairways, fan room and the linen service elevator platform. The total heights shown from the sidewalk elevation as above described to the high floor levels using the figures mentioned in this letter equals 105 feet 6 inches."

We have conferred upon this subject with the representative of Holabird and Roche and have given the matter very careful consideration, recognizing, as we do, the character and purpose of St. Vincent's Asylum.

Section 1301 of The Chicago Municipal Code of 1922 provides that in all fireproof buildings constructed of a greater height than 80 feet a fire pump shall be installed.

The word "height" is a more or less relative term and in interpreting its meaning we must take into consideration the purpose of the ordinance. In this case it is to promote the public safety in the way of preventing catastrophes resulting from fires. The proposed building is to be used above the height of 80 feet for the solarium, etc., and without going into unnecessary details we have no doubt that as concerns the proposed building, the ordinance requiring a fire pump in a fireproof building constructed of a greater height than 80 feet is applicable thereto.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

Use of Hall Without Automatic Sprinkler System for Theatrical Purposes.

February 28, 1927.

MR. JOHN PLANT, Chief Fire Prevention Engineer.

Dear Sir:

This will acknowledge receipt of your letter of February 18th enclosing a communication from Rev. Herman Joseph Weber, president of the Kolping Society of America.

The Kolping Society of America, it appears, are arranging to erect a building of one story and basement 52 feet by 72 feet, for an assembly hall, with a seating capacity of 405 persons, said hall to be used for recreational purposes.

It further appears that this hall will have a stage equipped with standpipe and ventilation shaft and that the said stage will be used for assembly meetings, lectures and periodical entertainment by local amateur actors from the organization.

Plans for the building have been approved by the Building Department, but the question arises whether an automatic sprinkler system should be installed in said building.

The building, as we understand it, has been classified as Class 4b. Class 4b includes every building having a parish hall, lodge hall, dance hall, banquet hall, skating rink, assembly hall, halls used for the purpose of exposition and exhibition, and buildings having a hall for the purpose of instruction other than schools included in Class 8 and also every existing building having a hall used for theatrical purposes at the time of the passage of this ordinance, except such buildings as are included in Classes 4a, 4c, 4d and 5.

Section 1297 of The Chicago Municipal Code of 1922 provides in regard to automatic sprinkler systems for such buildings as follows:

“All buildings of Class 4b used as exhibition and exposition buildings and over one story in height; also all buildings of said class containing halls which are used regularly for theatrical purposes, in which event sprinkler systems shall be installed as herein required for buildings of Class 4c used in part for any purpose.”

“From the statements in their letter,” you write, “and the purpose of the organization it is no doubt evident that it is not to be used for theatre purposes.”

We have to advise you, therefore, that if you are of the opinion that the assembly hall in the proposed building is not to be used regularly for theatrical purposes, an automatic sprinkler system should not be required.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

Limit of Quantity of Gasoline Storage in Garage Without Frontage Consents for Filling Station.

March 1, 1927.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

This department is in receipt of your letter of February 21st enclosing a communication from the American Railway Express Company.

The American Railway Express Company desires to install one 1,000 gallon tank and one 2,000 gallon tank on the premises of 20 South Sangamon street. It is their inten-

tion to occupy this building starting March 1st and use it for garage purposes for the storing and maintenance of their automobile equipment, and the gasoline to be stored in the tanks, for which a permit has been requested, is to be used solely in their own equipment and is not intended for public sale.

You wish to be advised whether or not frontage consents are required for the installation of the said tanks, and in case no frontage consents are obtained, what is the limit in quantity of gasoline that may be stored in said garage?

This department has heretofore held that a garage that is maintained by public carriers like taxicab companies, cartage companies, express companies, etc., come within the definition of public garages as given in The Chicago Municipal Code of 1922. See Opinion of Assistant Corporation Counsel Hornstein, Opinions of 1924, page 858.

This department has also held that whenever a public garage desires to install tanks to store more than 1065 gallons of gasoline, it should be required to procure frontage consents under Section 2279. See Opinion of Assistant Corporation Counsel Veeder, Opinions of 1926, Page 39.

In view of the above, therefore, we beg to advise you that whenever a public garage, and as far as we are advised the garage in question should be regarded as a public garage, desires to store more than 1065 gallons of gasoline, it should be required to procure frontage consents under Section 2279.

Very truly yours,

WILLIAM L. SULLIVAN,

Assistant Corporation Counsel

Approved:

LEON HORNSTEIN,

Acting Corporation Counsel.

Resale of Tickets to Boxing Exhibition.

March 2, 1927.

HON. MORGAN A. COLLINS, Supérintendent of Police.

Dear Sir:

This is in relation to the request of Captain Charles L. Larkin for an opinion in reference to the resale of tickets to a boxing exhibition. It appears that an individual, who was not an agent of the promoter, sold a ticket or tickets for a price greater than the price printed on the face of the ticket. It does not appear that the seller was a regular broker. For the purpose of this opinion, it is assumed the seller is not engaged in the ticket brokerage business.

The Legislature, in 1907, passed an act prohibiting the sale of a ticket for a price in excess of the printed rate therefor. The act was held to be unconstitutional by the Supreme Court in the case of *People v. Steel*, 231 Ill. 340. Thus, it is clear that an individual, who occasionally sells a ticket as an incidental matter and not as a regular business, and charges therefor a price in excess of that appearing on the face of the ticket is not amenable to police regulation.

However, if an individual is acting as a ticket broker, he may be charged with the offense of selling without a license; or, if the ticket broker has a license, he may be amenable to the City for failure to comply with its provisions. For a fuller discussion of the distinction between the two classes of cases, you are referred to an opinion of the Corporation Counsel (Opinions, Vol. for 1925-6, p. 596).

Yours truly,

EDWARD M. QUINN,

Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,

Acting Corporation Counsel.

Loss of Right to Disability Benefits on Account of Failure to Contribute.

March 2, 1927.

RETIREMENT BOARD, MUNICIPAL EMPLOYEES' ANNUITY &
BENEFIT FUND:

Gentlemen:

Your request for an opinion *in re* right of Julia La Force to ordinary disability benefit, the following is submitted:

Your letter states that Miss La Force was certified from a civil service list on August 16, 1926, and worked up to and including December 31, 1926; that having been certified to her position after August 10, 1926, no deductions were made for ordinary disability benefits from her salary, because August 10th was the last day on which such deductions could be made; that she had paid into the fund as required by law for the current six months' period from January 1, 1927, to June 30, 1927; and that she was injured or became disabled on January 1, 1927.

Section 47 of The Municipal Employees' Annuity & Benefit Fund Act provides for the deducting of ordinary disability benefit contributions from the first payment of salary or wages due and payable to a municipal employee in the months of January and July of each year, and provides further that if the name of any municipal employee shall not appear upon the payroll of the department during the months of January or July, then such employee may pay the contribution directly into the fund on or before the 10th day of the next month. None of these provisions cover the case of Miss La Force, as her name did not appear on the payroll until after the 10th day of August passed, and no provisions are made in the law to cover payment at any other time.

The same section provides that ordinary disability benefit shall be paid to any municipal employee less than 65 years

of age who shall become disabled subsequent to January 1, 1922, as a result of any cause other than injury incurred in the performance of an act or acts of duty.

The right to be paid ordinary disability benefit is not made dependent upon the employee contributing into the said fund before the right accrues, but does provide that if an employee fails to pay the amount as provided for in Section 47 such employee shall not have any right to ordinary disability benefit thereafter. In other words, the right to ordinary disability benefits is conferred by Section 47 of the act, and that right can be lost only by failure thereafter to make payments of the amount at the time specified in that section.

I am of the opinion that the right to receive ordinary disability benefits accrued to Miss La Force as soon as she became a beneficiary under the act and that this right was not lost by her because of no payment or contribution having been made prior to January 1, 1927.

Yours respectfully,

GEORGE F. MULLIGAN,

Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,

Acting Corporation Counsel.

Legality of Proposed Ordinance for Abatement of Smoke Nuisance.

March 2, 1927.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.

Dear Sir:

In reply to your recent communication addressed to the Corporation Counsel, wherein you request an opinion as to

the legality of a proposed ordinance pertaining to the abatement of the smoke nuisance, your attention is invited to the following:

Questions relating to the powers of the City Council to regulate the emission of dense smoke and for the abatement thereof, have received the attention of this department on numerous occasions. See opinion of June 23, 1880 (Opinions of Corporation Counsel, 1872-1897, page 28); opinion of July 22, 1904 (1897-1905, page 935); opinion of April 7, 1905 (1897-1905, page 1220). This last mentioned opinion was quoted at length in our recent opinion, No. 1607, of September 10, 1926; see also opinion of June 15, 1914 (1913-1914, page 953). There are also several other opinions relating to the same subject, but the foregoing fully cover the questions of law involved.

Section 2129 of The Chicago Municipal Code of 1922 provides in part as follows:

“The emission of dense smoke within the city from the smoke stack of * * * any building or premises, except for a period of six minutes in any one hour during which the fire box is being cleaned out or a new fire being built therein, is hereby declared to be a nuisance *and may be summarily abated by the commissioner of health or by anyone whom he may duly authorize for such purpose.* Such abatement may be in addition to the fine hereinafter provided. Any person, * * * operating or in charge or control of any locomotive, * * * or other similar machine or contrivance, or of any building or premises, who shall cause or permit the emission of dense smoke, within the city, from the smoke-stack or chimney of any such locomotive, * * * or from the smoke-stack or chimney of any building or premises so owned, controlled or in charge of him or it, except for a period of six minutes in any one hour during which the fire box is being cleaned out or a new fire being built therein, shall be deemed guilty of a violation of this section, *and upon conviction thereof shall be fined* not less than ten dollars nor more than one hundred dollars for each offense; and each emission of dense smoke in violation of the provisions of this section shall constitute a

separate offense for each and every day on which such violation shall continue." (Italics ours.)

You will note that the above section provides for "summary abatement" in addition to enforcing the penalty by way of fine. Such fine to be imposed "upon conviction."

The proposed ordinance submitted by you for our consideration, provides, *inter alia* (1) :

"That firm, corporation or person owning or operating any fuel burning apparatus the stack or stacks of which are subject of repeated violations of the Ordinance Governing the 'Emission of Dense Smoke,' *upon demand by the Commissioner of Health*, shall be required to install and maintain a Mechanical Smoke Recorder of a type approved by the Health Department."

(2) The proposed ordinance then describes the performance required of such mechanical recorder; provides for daily records to be dated and signed by the person in charge of the plant, which records shall bear the name of the person owning the plant, and further provides that such record of the previous continuous 24 hours shall be forwarded daily to the Commissioner of Health.

The proposed ordinance further provides:

(3) "The third notice of a smoke violation in any 30 day period shall be cause for the Commissioner of Health to order the installation of such a Mechanical Recorder, *and failure to comply with the order* within 15 days thereafter shall constitute a misdemeanor and punishable with a fine of \$....."

(4) The proposed ordinance further provides that it shall be a misdemeanor to tamper with the recording instrument in any manner which would result in false records, and imposes a penalty of \$....

The proposed ordinance further provides:

(5) "The only exceptions to the above are private residences and small flat and apartment buildings *where it is not practical to install a Mechanical Smoke Recorder*;

the Commissioner of Health shall be the judge in this matter."

(6) "The installation of such a Mechanical Smoke Recorder shall not in any way excuse the violation of any other clause of the Ordinance governing the 'Emission of Dense Smoke', and the penalties provided for violation of other provisions of the Ordinance shall apply whether or not a Mechanical Smoke Recorder is installed." (All italics ours.)

The law is thoroughly established that a municipal ordinance of a regulatory nature in contravention of the natural rights of individuals, enacted under general charter powers, is not only required to be constitutional but must be reasonable as well, and the court before which it is brought must be able to see that it will tend to promote the public health, morals, safety or welfare and that the means adopted are adapted to that end and that it is impartial in operation and not unduly oppressive. (*Elie v. Adams Exp. Co.*, 300 Ill. 340.)

Power to make ordinances on a given subject, conferred by the Legislature without prescribing the details, must be reasonably exercised, else the ordinance will be held invalid. (*Hawes v. City of Chicago*, 158 Ill. 653; *City of Chicago v. Pittsburgh C. C. & St. L. R. R. Co.*, 244 Ill. 220; *Landberg v. City of Chicago*, 237 Ill. 112.)

In the case of *People ex rel. Gamber v. Sholem*, 294 Ill. 204, an action was brought in the Circuit Court by John G. Gamber, state fire marshal, to recover penalties from Sholem for not complying with an order of the fire marshal issued under Section 9 of an act entitled "An act creating the office of State Fire Marshal, prescribing his duties and providing for his compensation and for the maintenance of his office," approved June 15, 1909. (Hurd's Stat. 1917, p. 2799.) Gamber inspected the premises of Sholem and thereafter served upon him a notice to remove or remedy the hazardous conditions as set forth in a letter attached to the notice and advising him to in nowise omit complying therewith under penalty of the state law.

The statute in question provided that the state fire marshal, his deputies and assistants, upon complaint of any person having an interest in any building or property adjacent, and without any complaint, shall have a right, for the purpose of examination, to enter into and upon all buildings within their jurisdiction. And further provided:

“Whenever any said officers shall find any building, or other structure which, for want of proper repair, or by reason of age and dilapidated condition, or for any cause, is especially liable to fire, * * * they shall order the same to be removed or remedied, and such order shall be forthwith complied with by the owner or occupant of said buildings or premises: *Provided, however,* that if the said occupant or owner shall deem himself aggrieved by such order, he may, within ten days, appeal to the State fire marshal and the cause of complaint shall be at once investigated by the direction of the latter, and unless by his authority the order is revoked, such order shall remain in force and be forthwith complied with by said owner or occupant. Any owner or occupant of buildings or premises failing to comply with the orders of the authorities above specified shall be punished by a fine of not less than ten dollars (\$10) or more than fifty dollars (\$50) for each day’s neglect; * * *.”

Concerning the constitutionality of the foregoing act, the court, at page 207, said:

“The chief objection to the constitutionality of this section is that it does not fix any rules by which the fire marshal shall determine when a building shall be declared to be, ‘for want of proper repair, or by reason of age and dilapidated condition, or for any cause,’ especially liable to fire, or when said building is ‘so situated as to endanger other buildings or property, * * *,’ and that therefore the vesting of the power in the fire marshal to determine when such conditions arise is, in the absence of any rule by which such shall be determined, a delegation of legislative and judicial authority. * * *

“It is well settled that the power to make laws for a State is vested in the legislature. This is a sovereign power, requiring the exercise of judgment and discretion, and as such cannot be delegated. (Sutherland on Stat. Const., Sec. 67.) The legislature may authorize others

to do that which it cannot do itself in the carrying out of valid laws. (*Block v. City of Chicago*, 239 Ill. 251.) *The power to make a law and the conferring of an authority and discretion as to its execution, which authority is to be exercised under and in pursuance of the law, mark the true distinction between powers which the legislature can delegate and those which it cannot delegate.* (*Arms v. Ayer*, 192 Ill. 601; *People v. Grand Trunk Western Railway Co.*, 232 *id.* 292.) As was said in *Yick Wo v. Hopkins*, 118 U. S. 356, any law that compels a man to hold 'any material right essential to the enjoyment of life at the mere will of another seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.' Arbitrary power, under the rules of law in this State and elsewhere, cannot be delegated by the legislature." (Citing cases.) (Italics ours.)

And continuing, at page 209, the court said :

"The rule is well settled in this State that the purpose of constitutional provisions is to protect every citizen in his person and property rights against the arbitrary action of any person or authority, and a statute which subjects any person's rights to the discretion of an officer, without any rules or provisions in the law to control the officer, violates such constitutional provisions." (Citing cases.) (Italics ours.)

And continuing, at page 213, the court said :

"The act fixes no duty on the part of the owner or occupant other than that the order of the fire marshal 'shall be forthwith complied with.' *The basis for the fine imposed is a failure 'to comply with the orders of the authorities above specified.'* We are unable to see how any other issue can form the basis of the penalty sought to be imposed. * * * While the legislature may reasonably regulate the manner in which property may be used, and regulations tending to lessen the hazard of fire are desirable, *we are of the opinion that said section, because of the delegation of arbitrary discretion, is without the power of the legislature to enact.*" (Italics ours.)

The proposed ordinance is clearly unconstitutional under the rule of law enunciated in the above case, inasmuch as it

attempts to penalize the failure to "comply with the order" of the Commissioner of Health and render the person so offending liable to the imposition of a fine for the violation of such order, as distinguished from a violation of the ordinance relating to dense smoke, which affords the defendant a day in court and an opportunity to put in a defense as to the question of his guilt or innocence.

The proposed ordinance also makes its enforcement discretionary with the Commissioner of Health; the installation of the proposed smoke recorder is made contingent upon the "demand" of such officer.

In my opinion said proposed ordinance is unreasonable and therefore invalid, for the reason that it does not purport to apply to all buildings and premises of the same class, but bases its exception on the question of alleged impracticability.

By reason of the foregoing I return herewith the proposed ordinance without approval.

Respectfully submitted,

ROY S. GASKILL,

Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,

Acting Corporation Counsel.

Use of Vacant Lots for Training and Riding Camp for Horses.

March 3, 1927.

HON. ALBERT E. LOESCHER, Alderman 44th Ward.

Dear Sir:

We have your letter of the 26th ultimo to which you attach a petition of certain property owners on Webster avenue in the block between Sedgwick and Cleveland avenues.

From what you have placed before us, we understand that approximately 27 property owners on Webster avenue in the block between Sedgwick and Cleveland avenues protest and oppose the use of the vacant lots situated at 424-426 Webster avenue as a training and riding camp for horses, in that the use of these lots for their present purpose violates the provision of the Zoning Ordinance, the said block being zoned as an apartment district.

Section 6 of the Chicago Zoning Ordinance provides as follows:

"Apartment District. (a) In an apartment district no building or premises shall be used nor shall a building be erected, altered or enlarged which is arranged, intended or designed to be used for a C or M use as defined hereinafter. In an apartment district no building or premises shall be used nor shall any building be erected, altered or enlarged which is arranged, intended or designed to be used except for R or A uses or special uses exclusively as hereinafter provided.

(b) For the purposes of this ordinance, A uses are hereby defined as uses other than 'R' uses designed for and permitted in apartment districts and conforming to the provisions relating to such district, and all A uses are classified as A1, A2 or A3 uses as follows: * * *"

The fifteen paragraphs under Section 7 dealing with auxiliary uses in residence or apartment districts do not provide for the use of premises as a "training and riding camp for horses."

Section 8 of the Chicago Zoning Ordinance, which deals with commercial districts is in part as follows:

"(b) For the purposes of this ordinance C uses are hereby defined as uses other than R and A uses * * * all C uses are further defined and classified as C1, C2 or C3 uses as follows: * * *"

Under the classification of C1 uses the ordinance contains this provision:

"School for dancing except as hereinbefore classified, trade or vocational school other than a M use—horseback riding school;"

It is apparent from what we have stated above that a "horseback riding school" is classified under our Zoning Ordinance as a C1 use. As the block in question is zoned as an apartment district, C uses are not permitted. Consequently the use of the premises at 424-426 Webster avenue as a "training and riding camp for horses is prohibited under the Zoning Ordinance.

We are assuming in the above that the premises in question at the time of the passage of the Zoning Ordinance were not used for the present use.

In view of the fact that the Zoning Ordinance is enforced by the Commissioner of Buildings (Section 25, Chicago Zoning Ordinance), we are this day forwarding a copy of this letter to Hon. Frank E. Doherty, Commissioner of Buildings, who will undoubtedly take steps to prohibit the violation complained of.

Consistent with your request, we are herewith returning the petition you placed before us.

Very truly yours,

BARNET HODES,

Approved: *Assistant Corporation Counsel.*

LEON HORNSTEIN,

Acting Corporation Counsel.

Extra Compensation on West Madison Street Paving Contract.

March 3, 1927.

HON. EDWARD J. GLACKIN, Secretary, Board of Local Improvements.

Dear Sir:

In response to your letter of recent date, in which you submitted copies of certain correspondence in the matter of

the claim of the White Paving Company for extra compensation for additional binder used in the paving of West Madison street from Cicero avenue to Austin boulevard, Warrant 50703, we submit the following:

It appears that when the bids were received on this work the White Paving Company was not the lowest bidder. This company's bid on the estimated quantities amounted to \$364,825, and there was a bid before you amounting to \$351,606.50. There was a notation made on the contract, and the contract was awarded in conformity thereto, which read as follows:

“Notwithstanding the above-named unit prices, the contract is awarded with the understanding that the total will not exceed the amount of the Commonwealth Improvement Company's bid of \$351,606.50.”

It appears further that the estimated amount of binder to be used on the job was 9,300 tons, but that later, and while the work was in progress, it was found that certain assumptions that had been indulged in were in error and that additional binder was necessary. The amount of additional binder was 3,053 tons.

Although the totals, under the engineer's estimates at the time of the awarding of the contract, according to the unit prices, would have brought the White Paving Company's total price above that of the other bidder, nevertheless, its bid on the binder was only \$8.50 per ton as compared to \$8.98 per ton of the lower bidder.

Consequently, upon the completion of the work within the engineer's estimates, the contracting company would have performed its contract if it had stopped then and had done this for the price agreed upon—\$351,606.50. We understand that the amount charged was not in excess of that, but that upon the completion of that work the contractor received only \$350,622.50, on account of deductions being made in quantities of other materials than binder.

The additional binder thus ordered and delivered cannot properly be said to be a part of the contract, further than

that the unit price given thereon must prevail. In other words, the White Paving Company is entitled to its price of \$8.50 per ton for all the binder delivered in excess of the engineer's estimate if it performed the work included in these estimates for the price agreed upon, which your data shows that it did. In fact, we find from your correspondence that the deductions which were made on account of less quantities (other than binder) brought the amount actually received under the original estimate, as already stated, to only \$350,-622.50. We therefore recommend that this claim be allowed, it appearing that the warrant is sufficient to cover same.

We return herewith a file belonging to your office which we borrowed for the purpose of arriving at a full understanding of the situation.

Yours truly,

LEON HORNSTEIN.

Acting Corporation Counsel.

Interpretation of Policemen's Annuity and Benefit Fund Act with Respect to Interest on Contributions.

March 3, 1927.

RETIREMENT BOARD, POLICEMEN'S ANNUITY & BENEFIT FUND.

Gentlemen :

Replying to your request for an opinion as to the proper interpretation to be placed upon Paragraph B of Section 19 of the act covering calculation of the interest on city contributions, the following is submitted, confirming verbal opinion heretofore given in this matter.

It is a fundamental principle of law that in the interpretation of a statute, the entire statute should be considered and the purpose and intent of the statutory enactment carried out if possible.

It is very clear, from a reading of the Policemen's Annuity and Benefit Fund Act, that it was the intention of the Legislature in passing it that the annuity accumulation of each policeman should consist of three factors, namely, (a) the policemen's contribution, (b) the City contribution, and (c) the interest improvement. It is also quite clear that it was and is the intention of the act that every contribution by policemen shall be accompanied by certain contributions on the part of the City, and that, so far as concerns prior service annuity, there should be placed to the credit of each policeman not only the contribution paid by him at the time it was made but one-twelfth of $8\frac{1}{2}$ per cent of his annual salary for each month that he himself had contributed with the same force and effect as if such City contribution had actually been made at the time the policeman made his contribution. In an opinion heretofore rendered, being Opinion 1574, it was held that interest on the contributions of the policemen should be computed from the date each such contribution was made; there does not appear to be any reason why assumed contributions of the City should not be computed from the same date and in the same manner. In fact every intendment of the law and every good reason seems to indicate that the two contributions, the actual of the policemen and the assumed of the City, should be handled in the same manner. Paragraph B of Section 19 provides that interest on the City's assumed contribution shall be computed at the rate of 4 per cent per annum to the first day of January, 1922, upon the assumption that one-twelfth of the City's $8\frac{1}{2}$ per cent of salary contribution was due at the end of each month of the policemen's prior service. From what date is interest to be computed if it is not the date upon which the assumed contributions are presumably credited, namely, "the end of each month of such service"? There must be a starting point for the computation of interest, and no other starting point is designated in Paragraph B excepting the one indicated in the closing words of the paragraph, which specifically states that interest shall be computed "upon the assumption that one-twelfth of such $8\frac{1}{2}$ per cent of such an-

nual salary was due at the end of each month of such service." I am of the opinion that interest on the assumed contributions of the City referred to in Paragraph B of Section 19 should be computed as to each such assumed contribution from the end of each month of such prior service.

Yours respectfully,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

Reinstatement of Patrolman Under Court's Mandate.

March 3, 1927.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

We are replying to your inquiry of March 2d, inst., as to whether or not you should require Patrolman Orville B. Holland "to sign a waiver of salary for the period from January 31, 1925, to November 12, 1926, before reinstating him." Since this reinstatement must be made according to the writ of mandamus issued out of the Superior Court, compliance with such writ must be made without exacting any waiver. An officer upon whom a writ of mandamus is thus served has no alternative but must obey such writ substantially according to its terms.

Two cases are involved in Patrolman Holland's discharge and reinstatement. First, certiorari to quash the Civil Service Commission's order of discharge, which Judge McKinley sustained on November 12, 1926. The other is the mandamus action upon which this writ is based. The Supe-

rior Court's judgment quashing the record of Holland's discharge will, in our opinion, be reversed. This, however, does not affect Holland's right to reinstatement and salary from the date of such judgment until its reversal by the Appellate Court.

This is the law as declared by the Supreme Court in the case of *People ex rel. John C. McDonald v. Thompson*, 316 Ill., page 11. If Judge McKinley's decision should be reversed, Holland would thereby be ousted, and the Civil Service Commission's order of discharge would be reinstated. The payment of salary to Holland would again cease. The right to recover the salary for which you suggest that Holland be made to sign a waiver is fully covered by our opinion of November 20, 1925, of the Opinions of the Corporation Counsel, Francis X. Busch, of 1925 to 1926, p. 434. This opinion was based on the claim of John C. McDonald in the case above referred to, and is in all respects similar to this claim of Holland. We would respectfully refer you to such opinion as applying to this phase of Mr. Holland's case.

Another reason for not exacting a waiver of this salary is that such waiver might be taken by Mr. Holland as a consideration for his complete absolute reinstatement and affect our case for the reversal of the Superior Court's certiorari judgment.

We, therefore, advise that reinstatement be made as directed by writ without the suggested waiver.

Yours very truly,

FRANCIS J. VURPILLAT,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

Notice of Vacation and Demolition of Building.

March 3, 1927.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.

Dear Sir:

This will acknowledge receipt of your communication of the 1st instant in connection with unsanitary buildings.

You advise us that the Board of Review (undoubtedly meaning the Board of Survey as constituted under Section 2167 of The Chicago Municipal Code of 1922) is making a canvass of some 200 buildings, many of which it will be necessary to condemn. That in the past your department has made use of a placard in this connection which you attach to your letter to us for notice of vacation and condemnation where premises were not fit for human habitation.

You wish to be advised as to whether or not you may properly use this placard.

The placard that you attach is as follows:

Department of Health—City of Chicago.

Herman N. Bundesen, M. D.—Commissioner of Health.
NOTICE OF VACATION AND CONDEMNATION.

Date.....192

TO THE OCCUPANTS:

The within Premises known as No.....
Street, having been condemned as unfit for human habitation, all occupants and tenants are hereby notified to vacate the same within days from this date. See Sections 2165, 2166, 2167, 2168, 2169 of The Chicago Municipal Code of 1922.

(Section 2168 is here fully set out.)

HERMAN N. BUNDESEN, M. D.,
Commissioner of Health.

Section 2168 of The Chicago Municipal Code of 1922, which is quoted in the placard, is in part as follows:

“Whenever it shall be decided by the Commissioner of Health that any building or part thereof is unfit for human habitation * * * and *notice of such decision shall have been affixed conspicuously on the building or part thereof* so decided to be unfit for human habitation * * *

It is obvious from the portion which we have quoted from Section 2168 that it is expressly intended that a notice of the character submitted by you shall be affixed conspicuously “on the building or part thereof * * * unfit for human habitation.”

We would, however, suggest that instead of the caption reading, “Notice of Vacation and Condemnation,” that you change it to read “Notice of Vacation and Demolition.”

We suggest this change because of the fact that Section 2167 of The Chicago Municipal Code of 1922 declares that upon the failure of a person to obey the notice of the Commissioner of Health, the vacation of the building shall be ordered, and if within thirty days after such vacation has been ordered the building or buildings are not put in a sanitary condition, “then the Commissioner of Health shall have the power to order the *demolition* of such building or buildings.”

Very truly yours,

BARNET HODES,

Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,

Acting Corporation Counsel.

Rights of Contractors for Extra Work on Wacker Drive.

March 5, 1927.

HON. FRANK X. RYDZEWSKI, Acting President, Board of
Local Improvements.

Dear Sir:

You submitted to us some time ago the question of the propriety of authorizing payments on vouchers for the Mid-Continent Construction Company on which allowances for extra work appear. The request involves more than the disposition of questions of law that may arise concerning these matters.

It would seem that there is a large amount of money involved and that vouchers for a considerable sum are being held up. We are informed, as to some of the items on these vouchers, they are merely regular charges authorized by the contract according to the quantity prices for units as bid and not in the nature of extras. If these could be separated from the rest, of course, there would be no difficulty about them.

As to others which appear therein as extras we have discussed the matter with the representatives of the contracting company, with the engineer in your office and with you. From the information at hand we learn that the contractor was pushed as hard as possible on the work; that the late Mr. John J. Sloan, as President of the Board of Local Improvements, continually urged the contractor to do work with all possible haste, and where extras were involved he would insist on the work going ahead without waiting for the action of the Board of Local Improvements. While Mr. Sloan was alive he would secure the necessary approval of the board as soon as he could. When the time came when he was in failing health he even attempted to do some of this from the hospital

at which he was lying, but necessarily it was difficult for him to do that. Considerable allowance should be made for this state of facts in order that no undue hardship should fall on the contracting company, which apparently acted in good faith and with the object in view of completing the improvement within the time set.

It seems also that it was assumed by Mr. Sloan during his lifetime that when he directed the engineer to give orders in regard to extras such orders would be taken care of in the same way as in case he gave the orders himself. Thus it happens that some of the items for extras were on the order of the engineer instead of on the order of Mr. Sloan himself. On this point the engineer, Mr. Evans, says in one of his letters that Mr. Sloan was under the impression that extra work orders on the engineer's certificate were sufficient evidence that the board authorized the work and approved it when done.

As a result of these things, after Mr. Sloan's death, certain vouchers were held up pending approval by the Board of Local Improvements. The Comptroller sent word to the Board of Local Improvements to have such approval of extras from the board before drawing warrants for the vouchers. The board did not do this, but submitted the matter to the Mayor, who in turn advised the board to ask the opinion of the Corporation Counsel. This places before us not only the question of the authority of the board to act, but the questions of fact as to whether or not the work was necessary, whether it should be regarded as an extra in each instance, whether it was done properly, and whether it was accepted by the City. We feel that such action should be taken by the board. If the board will pass on these questions of fact we will then advise them with regard to the questions of law involved.

The questions of law involved, assuming that there is no question as to the good faith of all parties, relate principally to the matter of form and time within which certain acts should have been done. In other words, the contract and the law require that certain formalities should be gone through

with before extras should be allowed. These formalities were not observed strictly. The failure to observe these formalities may be excusable under the conditions, especially when it is considered that the president of the board was not physically able to attend to such matters with the promptness and preciseness that the law requires. We do not wish to pass on these legal questions, however, until the board informs us as to its position in regard to the questions of fact that we mentioned above.

Awaiting further word from you in regard to the questions involved, we are

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

[Note: See further opinion on the same subject-matter, which follows here out of its chronological order for the purpose of preserving the continuity of the two opinions.]

Extra and Additional Work on Wacker Drive.

March 25, 1927.

HON. FRANK X. RYDZEWSKI, Acting President of Board of
Local Improvements.

Dear Sir:

A letter signed by Mr. T. A. Evans, Engineer in Charge of Special Improvements, was forwarded from the Board of Local Improvements to this department. The purpose of same was to obtain an opinion for the Board of Local Improvements with respect to the propriety and legality of paying

for certain extra and additional work done by the contractors on the Wacker Drive improvement. The question presented related to payment for bills numbered 288, 289, 290, 307, 314, 356, 380 and 382 rendered by the Mid-Continent Construction Co. Since then this list was supplemented by a complete list of the unpaid bills, so that this question now includes the whole subject-matter of these unpaid bills. Attached to this letter were a large number of exhibits, copies of correspondence, and other data designed to give us a complete history of the claims, all of which we return herewith, together with subsequent letters, a list of same being appended hereto.

From the material thus presented to us it was plain that the specific method prescribed in the contracts of the Board of Local Improvements for the authorization, ordering and approval of extra and additional work had not been followed. On the other hand, the letter stated—

“As you know, the work on the South Water Street Improvement was done under Mr. Sloan’s personal direction and the writer is familiar with his instructions to the contractor. Mr. Sloan was under the impression that extra work orders, if placed on the engineer’s certificates, similar to certificate No. 13, copy attached hereto, was sufficient evidence that the Board authorized the work, or approved the work as done.”

It therefore became a question of the *bona fides* of the transactions involved, the value or reasonableness of the price of the work, its necessity, its completion and acceptance. In order to get the position of the Board of Local Improvements on these points we addressed a letter to the board making specific inquiry with respect to these facts, which form the necessary basis for our opinion as to the law applicable to the case.

In reply to our letter we received a reply, under date of March 18, 1927, to which you attached a letter from the engineer in charge, to the board, under date of March 14, 1927, and a tabulated statement of the unpaid bills, showing the claims originally made, the amount allowed by the engineer,

and the character and date of the order or approval as to each item.

From the presentation of facts thus placed before us, it appears that the work on the improvement known as Wacker Drive was carried on under very high pressure, and that it was necessary to speed up the contractor constantly in order to have the work done within the time contemplated, that it was the practice of the late Mr. John J. Sloan, president of the board, to give orders for such extra and additional work and obtain the sanction of the board after such orders were given, that these orders were either given by Mr. Sloan himself or by the chief engineer and that it was by reason of this practice and the illness and death of Mr. Sloan that the question in regard to the payment of these bills arose.

We can find nothing in all the information you have given us which calls into question the good faith of the contractor. In fact, the engineer's letter would seem to indicate that the impression had prevailed that the procedure followed was regular until later questioned, and he sums up the situation as follows:

"To sum up I desire to say with respect to every one of the bills described in the attached statement (without a single exception) the work and materials were necessary and essential to the completion of the contract and to the construction of the Wacker Drive improvement; in every case (without exception) it was authorized or approved by Mr. John J. Sloan or the Board of Local Improvements; in every case (without exception) the materials furnished were of the highest quality and excellence and the work was done by the contractor in a proper and workmanlike manner; and in every case (without exception) the work and materials have been inspected by me and my division engineers and have been approved by me and my division engineers as agents and representatives of the City of Chicago. In my opinion these outstanding bills of the Mid-Continent Construction Company are just, reasonable and legitimate. They constitute valid obligations of the City of Chicago and should be paid."

We therefore conclude from your letters, and the exhibits presented therewith, that while the procedure was irregular, the extra and additional work done was a necessary part of the improvement, that the contract is fully performed, that the amounts allowed by the engineer are reasonable and proper, and that the work has been accepted by the City. Such being the case, the law in this state requires that the contractor should be paid.

The principle of law involved is that where an officer of a municipal corporation has irregularly entered into a contract, if the contract was fully performed in good faith by the contractor and accepted by the municipality, the municipal corporation is bound to pay on the *quantum meruit*, or in other words, it is bound to pay the fair and reasonable price for the work.

The propriety of payment in such a case as the one presented here was recognized in Illinois at least as far back as 1881. Dillon, in his work on Municipal Corporations (Sec. 791), in citing the case of *East St. Louis v. E. St. L. G. L. & C. Co.*, 98 Ill. 415, says that in Illinois, where a municipal corporation has entered into a contract even beyond its powers and has induced a contractor to expend money in the performance of it, the corporation may be held liable. Later, in Section 793, the author makes use of the following language:

"Illinois Doctrine. While it has been frequently decided that where a municipal corporation has received the benefit of labor or materials without any special contract to pay for them the law implies a promise to pay for what has been received and enjoyed by the corporation, this doctrine has been confined to instances where the corporation *has had the power* to contract in a proper manner for the labor and material thus received, although it may not have followed the proper manner. *Maker v. Chicago*, 38 Ill. 266; *Badger v. Inlet Drainage Co.*, 141 Ill. 540; *East St. Louis v. East St. Louis Gas, etc., Co.*, 98 Ill. 415; *Harvey v. Wilson*, 78 Ill. App. 544; *Keith v. DuQuoin*, 89 Ill. App. 36. In other cases where labor or materials have been furnished to a municipal corporation in a manner not authorized and where the municipi-

pality has had the power to contract for the same in a different manner, the municipality has been held *upon the same doctrine of estoppel*, but differently expressed, as upon the ground that any positive acts by municipal officers which may have induced the action of the adverse party, and when it would be inequitable to permit the corporation to stultify itself by retracting what its officers have done, may work an estoppel. *Sexton v. Chicago*, 107 Ill. 323; *Chicago v. Sexton*, 115 Ill. 230."

One of the late expressions of our Supreme Court on the principle involved was in the case of *McGovern v. City of Chicago*, 281 Ill. 264, decided in December, 1917. We have followed this decision since that time in all cases like the one we are now passing on. There the court said, at page 280:

"It was not shown that the McGovern Company did not enter into the contract in question and carry it out in good faith. Whether or not it did so was a question of fact and a matter of proof that has been settled in its favor. The only argument against its good faith in making the contract was in making the so-called unbalanced bid in the manner it did. The reasons for making the bid in that manner have already been referred to. It might have been ground for rejecting the bid, but where the city accepted it and the company did the work under it and charged according to the bid, can the city now take advantage of that fact or of the other matters urged against the legality of the contract?"

At page 282, it says:

"In *County of Coles v. Goehring*, 209 Ill. 142, it is said on page 165 of the opinion: 'Where a statute, in authorizing a municipal corporation to exercise a certain power, specifically regulates the mode in which that power is to be exercised, but the municipal authorities exercise it in a manner different from that prescribed by the statute, the municipality will be estopped from setting up the irregular exercise of the power when it is called upon to pay for what it has received. * * *'"

Again, in the same decision, the court quotes from Dillon, at page 283, as follows:

“There is another class of municipal contracts which are usually classed as *ultra vires* which are only so in a limited or secondary sense. These are contracts which are within the general powers of the corporation but which are void because the power was irregularly exercised, or where some portion of an entire contract exceeds the corporate powers but other portions of the contract are within the corporate powers. This class of municipal contracts is well illustrated by the case of *City of East St. Louis v. East St. Louis Gas Light & Coke Co.*, 98 Ill. 415. In that case the City of East St. Louis contracted for the lighting of its streets with the gas company, at a fixed price per light, for the term of thirty years. A suit was brought by the gas company to recover the monthly installments that were past due under the contract. The city defended on the ground that the contract was *ultra vires* and that no suit could be maintained thereon. This court held that the lighting of the streets was a purpose clearly within the corporate powers of the city; that the contract had no element of illegality in it, and that it was only illegal in respect to the term of its duration; that the corporation having received the benefits under a contract that was merely *ultra vires* it was bound to pay for the benefits received, and that the rule applicable to municipal corporations in this regard was the same as in the case of a private corporation. Many cases are to be found applying this rule, and the principle is now firmly established that the doctrine of *ultra vires* is not applied (except in cases where the contract is prohibited by some rule of law) where its enforcement would enable the municipality to obtain an unconscionable advantage over the other party to the contract, and that municipal corporations, as well as private corporations and natural persons, are bound by the principles of common honesty and fair dealing. Contracts made by a municipality which are merely *ultra vires* in a modified or secondary sense may be ratified and any defect in the manner of exercising the power thereby cured, and the municipality may likewise estop itself by acts *in pais* from setting up the defense of *ultra vires*.—2 Dillon on Mun. Corp.—5th ed.—sec. 797.’ ”

From the above it must be clear to you that the only questions that could be raised in this case were the questions as to the good faith of the parties and the reasonable value

of the work done and accepted. These having been settled, according to the letter you sent us under date of March 18th, we are of the opinion that the contractor is entitled to pay for the work, and that it will be proper and legal for the Board of Local Improvements to approve the bills in question.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Display, for Sale, of Toy Gun Made to Resemble Firearm.

March 10, 1927.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

This is in reply to your request for an opinion as to the legality of exhibiting and selling a toy gun being distributed by Hibbard, Spencer, Bartlett & Company—one of which you have submitted to us for inspection and examination. It appears from the letter of the Hibbard Company that the sale and display of such toy gun has been questioned by some of your officers and that in certain instances, the officers have requested customers of the Hibbard Company to remove such toy guns from their display windows.

The toy instrument in question is some two feet in length. It has a stock, a trigger and trigger guard, a hammer and two metallic barrels constructed in general imitation of guns used as firearms. This toy instrument, however, throws merely a wooden ball about the size of a small marble to a

distance of several yards by means of some spring mechanical action released by the drawing of the trigger. In its letter the Hibbard Company states "that an explosive substance cannot be used in it" and that "there is no shell or cartridge which can fit this toy and, furthermore, it is so flimsily constructed it would be impossible to use explosive substances in it." Does the exhibition and sale of the toy instrument in question contravene the restrictive or regulatory ordinances of the City?

Section 1265 of The Chicago Municipal Code of 1922 provides:

"License required.) It shall be unlawful for any person, firm or corporation to engage in the business of selling, or to sell or give away to any person, within the city, any air rifle, air gun, shotgun, rifle, fowling-piece, toy gun, toy pistol, or other toy firearm, or toy in the nature of a firearm in which any explosive substance can be used, without securing a license so to do as hereinafter provided, and no person, firm or corporation having secured such license shall sell, or give away, any such weapon to any person within the city who has not secured a permit from the superintendent of police to purchase such weapon in the manner hereinafter provided: provided, that it shall not be necessary for any person, firm or corporation licensed to sell deadly weapons to take out an additional license for the sale of the articles mentioned herein."

Section 1271 of said code, provides:

"Display prohibited.) It shall be unlawful for any person, firm or corporation to exhibit for sale in show cases, or show windows, on counters, or in any public manner, any air rifle, air gun, fowling piece, toy gun, shotgun, rifle, toy pistol, or other toy firearm, or toy in the nature of a firearm in which any explosive substance can be used, or to display any signs, posters, cartoons or display cards, suggesting the sale of any air rifle, air gun, fowling-piece, toy gun, toy pistol, or other toy firearm, or toy in the nature of a firearm in which any explosive substance can be used."

These sections comprise all the restrictive ordinances of the City relating to the sale or display of toy instruments in the nature of pistols or guns except Section 1227 of said code, which relates especially to sales to minors and does not broaden the restrictions contained in the sections just quoted. Does the toy instrument submitted by the Hibbard Company fall within any of the enumerated classes? We think it clear that the instrument is not within the designations *air rifle*, *air gun*, *shotgun*, *rifle or fowling piece*, all of which refer to well known classes of instruments or weapons of power discharged by compressed air or by explosives. There remains to be considered the expressions "*toy gun, toy pistol, or other toy firearm or toy in the nature of a firearm in which any explosive substance can be used.*"

In *Harris v. Cameron*, 81 Wis. 239, the court said: "A gun, in the usual sense, is a weapon which throws a projectile or missile to a distance." A toy is defined as an "article constructed mainly for the amusement of children; a plaything." *United States v. Strauss Bros. & Company*, 138 Fed. 185; *Wanamaker v. Cooper*, 69 Fed. 465; *Hamburger & Company v. United States*, 180 Fed. 632. A toy gun would be a plaything imitative of a gun. A firearm is a weapon constructed to act by force of gunpowder or explosive substances. 40 Cyc. 852; *Atwood v. State*, 53 Ala. 508. A pistol is a small light firearm. *Atwood v. State*, *supra*.

Applying these definitions it would seem that the toy in question is a "toy gun" if that expression as used in the ordinance is to be given an unqualified and unrestricted meaning covering all toys or playthings in imitation of guns or pistols. The primary canon of all construction, however, is that words shall be given the meanings which the legislative authority intended them to have if those meanings can be fairly determined. Under the rule or maxim designated *noscitur a sociis* general and specific words in a statute or ordinance which are capable of an analogous meaning are associated together and take color from each other so that the general words are restricted to a sense analogous to the less

general. *Misch v. Russell*, 136 Ill. 22; *People v. Bridges*, 142 Ill. 30. This rule is particularly applicable to penal statutes or other statutes requiring in general strict construction. *City of Chicago v. M. & M. Hotel Company*, 248 Ill. 264. The more frequently mentioned "rule or doctrine of *ejusdem generis*" which is especially applicable to the limitation of general words which follow a prior enumeration of particulars is but a branch of the rule of *noscitur a sociis*. (*Misch v. Russell*, *supra*; *People v. Melville*, 265 Ill. 176), and without regard to the priority of expression more general terms are in all cases restricted by association with more specific analogous terms unless there is something in the statute or ordinance to show that the rule should not be applied. *People v. Melville*, *supra*. Applying this rule of *noscitur a sociis*, the meaning to be given to the general terms "toy gun" and "toy pistol" is clearly restricted by their association with the expressions "*or other toy firearm or toy in the nature of a firearm in which any explosive substance can be used,*" and the provisions of the code extend only to toys (whether or not constructed in imitation of guns or pistols) in which some form of gunpowder or other explosive substance is or can be used.

This construction is further strengthened by the fact that Sections 1265 and 1271 appear in the chapter of the code designated "Firearms and Weapons" and in an article thereof designated "Toy Firearms." Other sections in that chapter impose onerous terms upon the securing of permits to sell or buy such toy firearms closely analogous to provisions relating to the sale and purchase of firearms as weapons that may be used in offensive or defensive combat. We are therefore of the opinion that exhibition and sale of the toy instrument now in question is not contrary to the existing ordinances of the City.

Our attention has been called to newspaper accounts concerning the use of toy guns and pistols (not constructed as toy firearms nor for the use therein of any explosive substances, e. g., glass pistols in imitation of revolvers) in the

commission of crimes committed in darkness. We have not in this opinion attempted to discuss the extent of power of the City Council to forbid the exhibition and sale of toys or other imitations of dangerous weapons for reasons other than the use therein of explosive substances. On the contrary, we have confined ourselves to construction of the ordinances of the City as now written. This being, however, a matter of public policy, we have taken the liberty of forwarding a copy of this opinion to the Committee on Judiciary of the City Council, where any necessary or proper revision of existing ordinances may be given full consideration.

Very truly yours,

C. M. DOTY,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Status of Bonds of Chicago Railways Company.

March 10, 1927.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

We have your letter in which you state that the Comptroller has been requested by the Harris Trust and Savings Bank, trustee under the first mortgage deed of trust of the Chicago Railways Company, to continue to certify the first mortgage bonds of the Railways Company in like manner as such bonds have heretofore been certified under the terms of the Traction Settlement Ordinance of the Railways Company passed February 11, 1907. You state that no new additional bonds are being issued by the Railways Company, but that

bonds already issued and outstanding are from time to time presented to be cancelled by reason of transfers of bonds or because the bondholder desires to change the form of his bonds and the Comptroller is asked to certify new bonds to be issued in lieu of such cancelled old bonds. The first mortgage deed of trust of the Railways Company provides for the issuance of its first mortgage bonds in both coupon and registered form and for the right of bondholders to assign and transfer their bonds at pleasure or to change the same from one form to the other at any time without affecting or limiting the enforceability or transferability thereof.

In some cases where bonds are now being turned in for cancellation and reissuance, coupon bonds (all coupons being now detached before the bonds are issued) are requested in the place of cancelled registered bonds.

Inasmuch as the period of street railway operation authorized by said 1907 ordinance has expired, the due date for payment of all first mortgage bonds of the Railways Company has passed, and the properties of the Railways Company are now in the hands of and are being operated by receivers appointed by the District Court of the United States for the Northern District of Illinois, pursuant to a bill brought by said Harris Trust and Savings Bank, trustee, to foreclose said first mortgage deed of trust upon the properties of the Railways Company, your inquiry is whether the Comptroller "should continue to certify these bonds whenever requested by the Harris Trust and Savings Bank." The answer to your inquiry requires an analysis of the nature and purpose of the Comptroller's certification of the first mortgage bonds of the Railways Company and of the ordinance and mortgage provisions authorizing such certification.

The nature of the 1907 ordinance as a settlement ordinance to provide a basis for reorganization, reconstruction, extension and improvement of the properties theretofore owned and operated by the Chicago Union Traction Company and its subsidiaries is too well known to require comment. Under that ordinance the Railways Company was obligated

to and did acquire the properties of its predecessor companies through the issuance of different series of junior mortgage bonds. Said 1907 ordinance then authorized the Railways Company to execute its first mortgage deed of trust and to issue its first mortgage bonds to defray the cost of all work of construction, reconstruction, equipment, re-equipment, extensions and additions provided for by said ordinance, but not to exceed the amount certified by the Board of Supervising Engineers to have been so expended—said amount to include certain percentages allowed by the ordinance to cover the costs of supervision and financing of such work. The ordinance then provides that,

“The Company shall not at any time create any lien or encumbrance upon the property or rights conveyed by said mortgage or deed of trust or any part thereof superior to that securing said bonds and obligations. Provided, however, that the Company shall not be authorized to make or issue said bonds or obligations to an aggregate amount exceeding the amount certified by the Board of Supervising Engineers, *nor shall the City be bound to recognize any of said bonds or obligations as having been authorized by this ordinance unless and until there shall be indorsed thereon by the City Comptroller or other officer or agent of the City designated by ordinance, a certificate to the effect that such bond or obligation is one of the bonds or obligations by this section authorized.*”

The first mortgage deed of trust, after providing for issuance of the first mortgage bonds of the Railways Company in both coupon and registered form as stated above, then provides, in accordance with the terms of the 1907 ordinance that,

“WHEREAS, the Railways Company is authorized to issue bonds secured by and entitled to the benefits of this indenture not to exceed in the aggregate the amounts hereinafter permitted and provided for; and it is provided in the Ordinance that there may be indorsed upon each of the bonds issued under this indenture, from time to time, a certificate of the City Comptroller of the City of Chicago, or of such other officer or agent of the said City who may be designated for that purpose, from time

to time, by an ordinance or ordinances of said City; which certificate shall evidence that the bond upon which the same is indorsed, is one of the bonds mentioned in and authorized by section seven of the Ordinance and entitled to the rights, priority and benefits in the Ordinance set forth; and which certificate shall be substantially in the following form, viz.:

(Form of Certificate under Ordinance.)

The undersigned, City Comptroller of the City of Chicago, does hereby certify that this bond is one of the bonds authorized under the provisions of section seven of an ordinance of the City of Chicago entitled 'An Ordinance authorizing the Chicago Railways Company to construct, maintain and operate a system of street railways in the streets and public ways of the City of Chicago,' passed February 11, 1907.

Dated,

.....

City Comptroller of the City of Chicago."

The first mortgage bonds now outstanding have been certified as required by said ordinance and mortgage deed, and your present inquiry is whether the Comptroller shall so certify new bonds issued in lieu of outstanding bonds and upon cancellation of old bonds equal in amount to any new bonds issued and certified.

We are of the opinion that the Comptroller may properly certify such new bonds issued upon cancellation of old bonds, but that the Comptroller should not, unless specially advised in relation thereto when the request is made, certify any new bond additional to those outstanding even though the amount of the same shall be within the amounts heretofore certified by the Board of Supervising Engineers, pursuant to the 1907 ordinance as expended by the Railways Company for the cost of construction, reconstruction, equipment, extensions, etc., of its street railway system.

While the period of street railway operation provided for by the 1907 ordinance expired by limitation on February 1, 1927, it is not to be concluded that all the contractual terms and provisions thereof necessarily expired on that date. Many

provisions in said ordinance expressly contemplate the event of expiration of said period of authorized operation and provide for the rights and duties of the contracting parties thereafter. It is not necessary to review such provisions here, but we are of the opinion that the authority granted to the Comptroller to certify new bonds in lieu of old ones outstanding upon transfer and cancellation of the old bonds attaches to said outstanding bonds and will persist during such reasonable time as may be required for liquidation or reorganization of the Railways Company and retirement of said bonds in accordance with law.

Moreover, the City Council, by an ordinance entitled, "An Ordinance granting a day-to-day permit for the unified operation of street railways in the City of Chicago," passed January 26, 1927 (accepted in writing by the receivers of the Railways Company on January 27, 1927) has granted to the Railways Company the further right to maintain and operate its street railway system in the City until July 31, 1927, subject (except as to certain matters and things therein expressly excepted which do not affect the question here presented) to all of the terms and provisions of said 1907 ordinance. By reason of such new ordinance the Comptroller would in any event be fully authorized during the period therein granted to certify new bonds in lieu of cancelled old ones, but we do not limit our opinion expressed above to the period covered by such new ordinance.

In furtherance, however, of our opinion that the Comptroller should not certify any new bonds additional to those outstanding, we desire to call attention to the following: The 1907 ordinance provides that,

"To the extent that the amount certified by said Board of Supervising Engineers (including said percentages) shall not be represented by bonds and obligations as aforesaid, a lien shall exist in favor of the company, its successors and assigns, of equal rank and like character to that securing the said bonds and obligations hereinabove authorized."

We are not informed to what extent the amounts certified by the Board of Supervising Engineers may exceed the amount of first mortgage bonds now outstanding, but by its bill filed December 15, 1926 (since consolidated with the bill of foreclosure of Harris Trust and Savings Bank, trustee, above referred to), the Westinghouse Electric and Manufacturing Company, a creditor of the Railways Company for moneys other than those represented by first mortgage bonds of the Railways Company, claims a lien of equal rank with that of the first mortgage bonds as to any such amount representing the difference between amounts so certified by the Board of Supervising Engineers and the amount of first mortgage bonds now outstanding. Certification of new additional bonds by the Comptroller might therefore involve him in a disturbance of the rights or priorities that may hereafter be declared by the court between holders of first mortgage bonds and other claimants of interests in the properties of the Railways Company whose interests became fixed as of the date when said bonds became due and payable.

We have consulted with counsel for the Harris Trust and Savings Bank as complainant in the bill to foreclose said first mortgage deed of trust, and they have concurred in our opinion that the rights, interests and priorities of different claimants against the Railways Company will not be disturbed nor the receivers of the properties of the Railways Company interfered with by the Comptroller's certification of new bonds in either coupon or registered form when such bonds are to be issued only in lieu of equivalent amounts of outstanding bonds to be thereupon surrendered and cancelled.

Very truly yours,

C. M. DOTY,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Reinstatement of Probationer.

March 22, 1927.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

Just received on this date your request for opinion in the matter of the reinstatement of a discharged probationer—one discharged from an original civil service position within six months from date of his appointment.

Section 10 of the Civil Service Act on the subject of "Appointment to Classified Service" provides that:

"The appointing officer shall notify said Commission of each position to be filled separately, and shall fill such place by the appointment of the person certified to him by said commission therefor, which appointment shall be on probation for a period to be fixed by said rules (six months by Sec. 5 of Rule IV of the Commission)

* * * At or before the expiration of the period of probation the head of the department or office in which a candidate is employed may, by and with the consent of said commission, discharge him upon assigning in writing his reason therefor to said Commission."

Continuing Section 10, *supra*, provides that:

"If he is not then discharged, his appointment shall be deemed complete."

In our opinion of date December 9, 1924, we held that one appointed under this section did not obtain the status of an original appointee in the civil service until this period of six months' probation had expired. (See Opinions of Corporation Counsel Francis X. Busch, 1924-1925, pp. 570-575.) Since the probationer has not attained his civil service status his case does not come within the provisions of Section 12 of the Civil Service Act governing discharges from the civil service. Section 10, *supra*, applying to a probationer, specifi-

cally calls him a "candidate" for the position to which he has been appointed; and since the head of a department, by and with the consent of the (Civil Service) Commission, is given power to discharge such probationer upon written reason assigned, we are of the opinion that there also exists the power to exercise executive discretion in the reinstatement of such probationer upon proper application, by and with the consent of the Civil Service Commission.

If, therefore, proper application for reinstatement is made to the head of a department, he may reinstate such applicant providing the Civil Service Commission gives official consent thereto.

Respectfully yours,

FRANCIS J. VURPILLAT,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Time Clause in City Contract.

March 23, 1927.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

Your letter of March 18th enclosing a suggested draft of a time charge clause to be inserted in the contract for the construction of the Roosevelt Road Bridge is received. The provision in question provides for the payment of a bonus of \$500 a day to the contractor for every day less than eleven months required for the completion of the work and for a reciprocal payment of the same amount by the contractor to the City for every day more than eleven months required for the construction of the bridge. You inquire whether or not

such an agreement is legal and proper and whether it meets our approval as to form.

The requirement that the contractor pay to the City \$500 a day for each day over the specified period is the usual form of liquidated damage provision in all building contracts. Such a provision is always subject to the possibility of being construed as a penalty rather than as fixing the real measure of damage sustained. If it should be held that the amount so required to be paid is in fact a penalty the provision would of course become inoperative. It is always difficult to anticipate what construction the courts will put upon these provisions. A contract for the payment of liquidated damages in order to stand up should contain sufficient recitals to show that a breach of the time covenant will result in actual damage and that it is impossible to accurately measure in money such damages as may be sustained and that the amount agreed upon as liquidated damages is as nearly accurate a determination of such damage as is possible under the circumstances of the particular case. This general idea has been carried out in the draft you submitted, while such recitals as are contained in the draft might be elaborated. We believe they state the essentials upon which the City would rely, and so far as the payment of liquidated damages to the City is concerned in the immediate situation under consideration, we believe that your draft is probably as effective as it can be made. There is probably no branch in the law concerning which more uncertainty exists than this question of liquidated damages, and for that reason we say that whereas your draft contains the essentials of such a stipulation it would be merely speculative on our part to advise you that such draft could be sustained.

With reference to the payment by the City of a bonus to the contractor for the time saved, we are unable to find anything in the code that authorizes such payment. The various provisions in the code relating to the letting of contracts for public improvements, while not specifically saying so seem to contemplate that such contract shall be let on a

basis of labor and material only. The only additional compensation authorized is that provided for in Section 3265 of the Code of 1922, but this section contemplates payment only for extra work, labor or materials not included in the original contract. We are inclined to believe that the authority of the Department of Public Works in the letting of contracts must be held limited by the code provisions, and that any authority not conferred upon the Commissioner must be understood to have been purposely withheld. In the absence of authority to the Commissioner to agree to the payment of a bonus to a contractor for time saved in construction work, it is our opinion that the Commissioner can not so contract. The City Council, of course, can authorize a departure from existing code provisions, and if it was thought desirable to enter into a contract such as you suggest the Council could authorize it, but under the existing provisions we believe that the execution of such a contract is not warranted.

Yours very truly,

JAMES J. COUGHLIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Tax Anticipation Warrants for Library Purposes.

March 24, 1927.

HON. JOHN A. CERVENKA, City Treasurer.

Dear Sir:

In response to your verbal request for an opinion as to whether it was necessary for special provision to be made by ordinance for the issuance of tax anticipation warrants

against library taxes for building purposes we submit the following:

It has been our custom to prepare and present to the City Council separate ordinances authorizing the issuance of tax anticipation warrants for school educational purposes and for school building purposes. This we have done because the section of the School Board Act which authorized the issuance of such warrants specifically mentioned the two purposes in such a way as if they were distinct. The language contained in Section 132 of the School Law is as follows:

“* * * and when there is not sufficient money in the treasury to meet the ordinary and necessary expenses for educational and for building purposes, to request the city council, whose duty thereupon it shall be, to order issued warrants against and in anticipation of any taxes levied for the payment of the expenditures for educational and for building purposes to the extent of seventy-five per cent of the total amount of the taxes levied for such purposes:”

Whether it is necessary to pass two ordinances as the City Council has done each year is doubtful, but in order to avoid any question that has been the practice.

We see no occasion, however, for doing this in the case of any other anticipation warrants that are issued, because these are all issued by virtue of the authority granted in Section 2 of the act providing for the manner of issuing same approved June 27, 1913. That section reads in part as follows:

“§ 2. That whenever there is not sufficient money in the treasury of any county, city, town, village or other municipal corporation to meet and defray the ordinary and necessary expenses thereof, including all expenses for building purposes, it shall be lawful for the proper authorities thereof to provide a fund to meet all said expenses by issuing and disposing of warrants drawn against and in anticipation of any taxes already levied by said authorities for the payment of all such ordinary and necessary expenses of such county, city, town, village

or other municipal corporation, to the extent of seventy-five per centum of the total amount of any such tax levied."

You will note from the above that express authority is contained in the law to issue warrants in anticipation of taxes in order to defray ordinary and necessary expenses "including all expenses for building purposes." Hence, we have the authority of the statute to the effect that ordinary and necessary expenses include building purpose taxes.

The ordinance authorizing warrants in anticipation of public library taxes which is now appealed to was passed on February 3, 1926, and appears on page 2448 of the Council Journal of that date. It is in the usual form, and merely authorizes the Mayor and City Comptroller to issue such warrants "for the purpose of paying such ordinary and necessary expenses," etc. We do not believe that it was necessary to mention building purposes specifically in order to authorize the use of such warrants for building purposes.

In case the same question should arise concerning tax anticipation warrants drawn against the Municipal Tubercular Sanitarium the same rule would apply in that case.

Yours truly,

LEON HORNSTEIN,

First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Bill of Powell Brothers for Rebuilding Curb and Gutter.

March 25, 1927.

HON. FRANK X. RYDZEWSKI, Acting President, Board of
Local Improvements.

Dear Sir:

You forwarded to us a bill from Powell Bros., sub-contractors of the Hedges Construction Company, for work done on 79th street from South Ashland avenue to South Western avenue, together with a letter of explanation from the Division Engineer. Your question is, whether this bill can be legally allowed. We forwarded to you as of this date an opinion with regard to allowances for work and material where contracts have been irregularly entered into. So far as the facts in the present instance come within the general rules laid down in Opinion No. 1829, they apply to this case also.

The only information we have is the bill itself and a copy of a letter written by the Division Engineer and approved by the Chief Engineer of Streets. The bill is made out to the Hedges Construction Company, and we assume that this company is the contractor for the 79th street improvement and that the bill, if allowed, will be allowed to the contractor. If we are mistaken with regard to this it will be necessary for you to write us again. It is stated in the letter of the Division Engineer that the bill in question was for rebuilding curb and gutter with concrete pillars; that the street was paved by the Hedges Construction Company in 1924; that the curb and gutter were practically destroyed during the following year by heavy traffic; that such condition is not unusual on streets with the center 16 feet left out for future car tracks; that it is the understanding of the Division Engineer that the late Mr. John J. Sloan, then President of the Board of Local Improvements, ordered the curb

to be rebuilt; and that the quantities in the bill agree with the inspector's reports and the prices seem reasonable.

As indicated in our former opinion to which we refer, the law department cannot say that the procedure was correct, because the provisions of the statute and of the contract have not been complied with. In the present instance the matter is further complicated by the fact that we have no means of determining whether or not the guaranty of the contractor covers this work, and aside from that this does not appear to be in the nature of an extra on a contract, but is more like an independent contract.

The mere irregularity of the placing of the order or contract for this work alone would not be sufficient to refuse to pay for it, but before it can be paid it must be shown that all parties acted in good faith; that the work was done at the request of someone in authority acting on behalf of the Board of Local Improvements; that it has been accepted by the City and that the prices are reasonable. We can assume that the last two things mentioned are complied with from the letter of the engineers. As to the first two that we mention, it is for the Board of Local Improvements to determine the questions of fact in relation thereto, and, if the board is satisfied with the bona fides of the transaction, it is authority to approve the bill.

The gist of our attitude with respect to matters of this kind is that the courts of this state have held repeatedly that the City cannot accept work and materials from a contractor and use it and then defend against a claim for payment on the ground of mere irregularity in the placing of the order. In such a case there is a long line of decisions to the effect that the municipality in dealing with contractors will be held to the principles of common honesty that must prevail in the dealings of private parties.

Yours truly,

LEON HORNSTEIN,

Approved: *First Assistant Corporation Counsel.*

FRANCIS X. BUSCH,

Corporation Counsel.

License Fee for Six-Day Bicycle Race.

March 25, 1927.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

In response to your letter of the 21st instant stating that the promoters of the six-day bicycle race now going on at the Dexter Park Pavilion have refused to pay the three per cent compensation due the City as a license fee, we beg to advise you that demand should be made on them forthwith for such license fee.

Under Section 176 of The Chicago Municipal Code of 1922 bicycle races are placed within the twenty-first class of amusements. Under Section 181 the license fee required for this class of amusement is three per cent of the gross receipts. We are satisfied such license fee can be enforced.

While it is true that we advised holding matters in abeyance in regard to the collection of such fees from the promoters of the professional hockey games until such time as the City Council could take action thereon, that stands on an entirely different footing, because there is no specific mention of that kind of games and a question might arise as to whether or not they are included in the three per cent provision. That is not the case with bicycle races, which are by ordinance expressly required to pay this fee.

We will therefore await a warrant for collection from your department, and, upon receiving same, we will begin suit for collection against the promoters, who (it is stated) are financially responsible.

Yours truly,

LEON HORNSTEIN,

Approved: *First Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Definition of Term "Private School."

March 25, 1927.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.

Dear Sir:

In your communication addressed to the Corporation Counsel, concerning the amendment of March 9, 1927, of Section 2153 of The Chicago Municipal Code of 1922, you request that we "define the words 'private schools' as contained in this section and differentiate between a public and private school."

In Vol. 35, *Cyclopedia of Law and Procedure*, at page 811, the author states:

"The term 'public' or 'common,' when applied to schools, has no reference to the kinds of studies to be taught, but in this connection the word means open to all, belonging to the public. Public schools are the schools which municipalities or districts are required to maintain, or authorized to maintain although not required to do so, as a part of the system of common education, and which are open and free to all the children and youth of the municipalities or districts in which they are situated, who are of proper age or qualifications to attend them, and which derive their support entirely or in part from money raised by a general state, county, or district tax.

A private school is one managed and supported by individuals." (Citing cases.)

In Vol. 24, *Ruling Case Law*, page 558, the author distinguishes public and private schools as follows:

"The only difference between a public and a private school is the nature of the institution. One is a public institution, organized and maintained as one of the institutions of the State. The other is a private in-

stitution, organized and maintained by private individuals or corporations." (Citing cases.)

Whether a school is "public" or "private" involves primarily a question of fact; so likewise does any attempt to state examples of Groups 1, 2 and 3 as set forth in your letter.

Respectfully submitted,

ROY S. GASKILL,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Destruction of Worthless Bonds.

March 26, 1927.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

We are in receipt of your letter of the 5th inst., in which you inquire whether it would be proper for you to destroy certain worthless bonds in your custody, and what procedure you should follow if you do this.

It appears from your letter that the City of Chicago is the holder of 350 bonds issued by the Chicago & Great Western Railroad Company, which were dated March, 1873, with an obligation extending over a period of 30 years, expiring in 1903. The bonds are of the face value of \$1,000 each and bear interest at 7 per cent. Nothing has been paid on them for upwards of forty years, if ever. Just how they came into possession of the City is not quite clear, but it is probable that they were accepted from David I. Gage, a former city treasurer, who was in default on account of the failure of a bank in which the City's funds were deposited. The record

concerning their acquisition is not available, and it is of no importance, because the bonds are of no value.

The validity of the issue of bonds of which these form a part was before the Circuit Court of La Salle County in 1885. A decree was entered by that court on March 4, 1885, holding that the issue was *ultra vires* and utterly void for reasons set forth therein, among which was the fact that they were issued without consideration and that they were used for the discharge of debts of other corporations than the railroad company. The decree also holds that the purchasers of the bonds had notice of their invalidity. David A. Gage and the City of Chicago were parties to the proceeding, which appears from a certified copy of the decree which you secured for the purposes of this opinion. There was no appeal from this decree. Hence, the City is bound by it, and has no recourse of any kind or nature against anyone.

Inasmuch as the bonds are clearly worthless, they may properly be destroyed. In order to preserve a record of them, however, we recommend the passage of a council order directing this to be done. We have prepared a draft of such order, and submit same herewith. We also return the certified copy of the decree which you procured for us, and the letter of the clerk of the La Salle County Circuit Court.

Yours truly,

LEON HORNSTEIN,

First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Uncalled for and Unpaid Warrants More Than Two Years Old.

March 29, 1927.

HON. JOHN A. CERVENKA, City Treasurer.

Dear Sir:

In your letters of March 15th and March 16th, you call attention to the two amendments of Section 47A of The Chicago Municipal Code of 1922, and ask to be advised regarding same. The section in question relates to the cancellation of warrants long outstanding or uncalled for which have not been paid.

When Section 47A was first amended on June 2, 1926, it was provided that whenever a warrant remained uncalled for or unpaid for one year after the last day of the fiscal year during which it was drawn it was to be cancelled, the treasurer was to be notified, and payment was to be withheld. In case the warrant was drawn against a special deposit or special fund (other than the water fund), the amount represented by the warrant was to be first credited to the fund, and then a similar amount of money was to be withdrawn from such fund and placed in the "reserve liability account," where it could be readily drawn on by means of a new warrant whenever the old warrant was presented for payment.

On March 9, 1927, the said section was again amended. By the last amendment, the date of cancellation was deferred to two years after the last day of the fiscal year in which the warrant was drawn. The method of handling such warrants, then drawn against a special deposit or special fund, was altered so that the amount of money represented by the warrant is to be withdrawn from the special deposit or special

fund and placed in the general corporate fund, against which the City Council is required to make a suitable appropriation in the annual appropriation bill, so that it can be paid out at once on a new warrant in case the old warrant is presented. The Comptroller is required to keep a register which will show the cancellation and subsequent payments.

In your first letter you inquire whether we regarded the provision for taking the money out of the special deposit or fund and placing it in the general corporate fund as a valid provision. The inquiry is no doubt prompted by the consideration you give to certain statutory provisions which require the treasurer to keep special funds separate from the general corporate fund. We assume that such inquiry does not apply to water fund canceled warrants, because the ordinance merely places the amount back into the general water fund.

The provision of the statute requiring special assessment funds to be preserved in a special fund reads as follows:

“All moneys received on any special assessment shall be held by the treasurer as a special fund, to be applied to the payment of the improvement for which the assessment was made, and said money shall be used for no other purpose whatever, unless to reimburse such corporation for money expended for such improvement.”

Cities and Villages Act, Art. VII, Sec. 12.

Moneys in such special assessment funds must necessarily be held therein until the rebates are to be paid therefrom, if there is more than is required for the improvement. The ordinance itself seems to contemplate this.

As to all other special funds, the provision is different. It reads:

“* * * and the city or village treasurer shall set apart such proportion of the tax collected and paid to him for the payment of such particular debt, appropriation or liability, and shall not disburse the same for any other

purpose until such debt, appropriation or liability shall have been discharged.”

Cities and Villages Act, Art. VIII, Sec. 4.

From this provision it will be seen that the residue from such special funds will ultimately be placed in the general corporate funds. To place the amount of an unpaid canceled warrant therein, subject to an appropriation for paying the warrant when it is presented, is at most anticipating the transfer in case the warrant is never paid. It remains subject to the debt that is payable from the particular fund, and may be said to be in such fund notwithstanding it has been placed where it is readily payable out of a current appropriation.

Unless some such plan as is contemplated by the ordinance is followed, such warrants remaining outstanding entail endless carrying forward and bookkeeping which can be avoided by the method set forth. Taking the statute as written and applying a reasonable and common sense construction, we find nothing to prevent placing the money required for such canceled warrant where it is immediately accessible for the payment of the warrant.

With reference to the use of the words “special taxation” in the ordinance, they have reference to the special taxation of contiguous property provided for under the Local Improvement Act. The fact that the ordinance speaks of rebates therefrom, in itself definitely determines this, since there is no such thing as a rebate to the taxpayer from taxes levied for the purpose of retiring bonds and paying interest thereon.

The only question asked in your second letter is whether the warrants which should have been canceled under the ordinance as it stood prior to March 9, 1927, may be paid at this time if presented to the city treasurer, provided they were not issued prior to December 31, 1924,—the two-year period.

Since the new ordinance completely replaces the old one, it is as if there had been no amendment passed on June 2, 1926. There can be cancellation of only such warrants as are

more than two years old. Hence, if there are any such warrants as you mention, they may be honored by the treasurer.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Leasing of Municipal Pier for Exhibition Purposes.

April 1, 1927.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

In your recent communication addressed to the Corporation Counsel, you make the following inquiry:

"Is it possible for the City to lease any part of the Municipal Pier to an organization that is going to hold an exhibition or performance, to which admission is to be charged? If this is done for profit would that alter the case?"

Questions concerning the right and power of the City to lease portions of the Municipal Pier and also the City's powers in the matter of regulation of the use of the pier, have received the attention of this department on several occasions. See Opinion of Corporation Counsel, dated March 20, 1922 (Opinions 1920-1923, p. 508); Opinion of April 30, 1923 (Opinions 1923-1924, p. 81); Opinion of May 10, 1923 (*id.*, p. 132); Opinion of July 30, 1923 (*id.*, p. 335).

In and by an act of the General Assembly, approved June 23, 1913, in force July 1, 1913, and amendments thereto,

which said act is commonly known and referred to as the Harbor Act (Chapter 24, Paragraph 1160 *et seq.*, Callaghan's Illinois Statutes, Annotated) full power and authority is given to every city and village in this state to acquire, own, construct and maintain harbors, etc., elevators, vaults, warehouses and terminal facilities.

In and by Section 17a (Paragraph 1177) of said act it is provided:

"Every such city and village shall also have the right, power and authority and such right, power and authority are hereby granted to use for public recreation purposes any portion of such utility which is not immediately needed for transportation uses or which can be used for such recreation purposes without interfering with the use of such utility for transportation purposes in the judgment of the corporate authorities of such city or village."

Section 17b (Paragraph 1178) of said act provides:

"In connection with the use of any portion of such utility for recreation purposes, as specified in the previous section hereof, every such city and village shall, also, have the right, power and authority and such right, power and authority are hereby granted, to provide, by lease or contract, for the sale in or on such utility of food, non-alcoholic drinks and merchandise and for the giving in or on such utility of dances, concerts, exhibitions and other entertainments and for check-room privileges incidental thereto; *Provided, however*, that each such lease or contract shall be terminable by such city or village, either with or without compensation therefor as may have been therein stipulated, upon reasonable notice, whenever in the judgment of the corporate authorities of such city or village the transportation necessities shall make such termination desirable: *And provided furthermore*, that no such lease or contract shall be entered into for a period exceeding five (5) years except in conformity with the provisions of section 11 of this Act."

Section 17c (Paragraph 1179) provides:

"Every power, right or authority which by this Act is granted to or conferred upon any such city or village,

may be exercised by the concurrence of a majority of all the members elected in the city council of such city or village."

By reason of the foregoing I am of the opinion that the City may lawfully lease a part of the Municipal Pier for exhibition purposes, notwithstanding the fact that an admission fee is to be charged, and that the question of such exhibition being given for profit does not affect the legality of the proposed letting, which, however, is subject to the action of the City Council.

Respectfully submitted,

ROY S. GASKILL,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Frontage Consents on Lot Extending to City Limits.

April 8, 1927.

MR. JOHN PLANT, Chief Fire Prevention Engineer.

Dear Sir:

This will acknowledge the receipt of your letter of March 31st requesting the views of this department.

Application has been made to you to install tanks for a gasoline filling station in a lot fronting on the north side of Sheridan road at its intersection with Juneway terrace. The street number is 7740 Sheridan road. This lot as subdivided

fronts 85.96 feet on Sheridan road. On its east line the lot is 213 feet deep. On its west line the lot is 220 feet deep. The width of the lot at the alley is 60.79 feet.

The plot of ground upon which it is desired to install the gasoline tanks is the rear 80 feet of this lot. Immediately in the rear of this 80-foot plot is a public alley 16 feet wide and adjoining that on the north is Calvary Cemetery which is in the City of Evanston.

Section 2279 of The Chicago Municipal Code of 1922 makes it unlawful to install tanks for the storage of gasoline in any lot or plot of ground without first obtaining the written consents of the property owners representing the majority of the total frontage in feet of any lot or plot of ground lying wholly or in part within lines 150 feet distant from and parallel to the boundaries of the lot or plot of ground upon which said tanks are to be installed.

The plot of ground upon which the tanks are to be installed in this case is reasonably large, being 80 feet in length and some 70 or so feet in width. If the applicant for the permit obtains consents as required by the ordinance for the installation of the tanks upon the plot of ground in question, that is the rear 80 feet of 7740 Sheridan road, we think he is entitled to a permit. The frontage of the lot in question, however, should not be credited upon the frontage consent petition as it is owned by the same person who owns the rear 80 feet of said lot and upon which rear 80 feet the tanks are to be installed.

You refer to our Opinion No. 1812, but that presented an entirely different situation, as in that case, among other things, the frontage of the lot was sought to be credited upon the frontage consent petition to install tanks on the rear thereof, and that we thought would not be in accord with the spirit of the ordinance.

In this case the lot as subdivided is unusually long. There are three gasoline filling stations immediately adjoining it on the east. North of it is Calvary Cemetery.

If the applicant secures proper frontage consents for the plot of ground which he describes as the rear 80 feet of 7740 Sheridan road, we see no objection to the issuance of the permit, but the frontage of the lot at 7740 Sheridan road we do not think you should allow to be included in such frontage.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Frontage Consents for Hospital.

April 8, 1927.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.

Dear Sir:

This will acknowledge the receipt of your letter of April 1st.

Application has been made to operate a hospital at 3741 West 66th place. Frontage consents were filed. The report of the Bureau of Maps shows a surplus of 59.67 feet on the south side of West 66th place between South Hamlin avenue on the west and Millard avenue on the east, and a shortage of .01 feet on the north side of West 66th place.

You wish to be advised whether the above frontage is sufficient to comply with Section 1862 of The Chicago Municipal Code of 1922 or whether a majority of frontage in feet is necessary on each side of West 66th place.

Section 1862 provides:

“1862. FRONTAGE CONSENTS REQUIRED—WHEN.) It shall be unlawful for any person, firm or corporation to

build, construct, maintain, conduct or manage in any block in which two-thirds of the buildings fronting on both sides of the street or streets on which the proposed hospital may face or extend are devoted exclusively to residence purposes, any hospital, unless the owners of a majority of the frontage in such block, and the owners of a majority of the frontage on the opposite side or sides of the street or streets on which said building faces or extends, consent in writing to the building, constructing or maintaining, managing or conducting of any such hospital in such block. Such written consents of the majority of said property owners shall be filed with the commissioner of health before a permit shall be granted for building or constructing any such hospital and before a license shall be issued for the maintaining, conducting or managing of such hospital."

The word "block" as used in the above ordinance does not mean a "square" but is defined in the ordinances as follows:

"920. DEFINITION OF WORD 'BLOCK.') Whenever a provision is made in this chapter that frontage consents shall be obtained for the erection, construction, alteration, enlargement or maintenance of any such buildings or structure in any block, the word 'block,' so used, shall not be held to mean a square, but shall be held to embrace only that part of a street bounding the square, which lies between the two nearest intersecting streets, one on either side of the point at which such building or structure is to be erected, constructed, altered, enlarged or maintained, unless it shall be otherwise specifically provided."

From a consideration of the above, we are of the opinion that a majority of the frontage in feet on each side of West 66th place is required under Section 1862 before a license may be issued to operate the hospital in question.

Very truly yours,

WILLIAM L. SULLIVAN,

Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,

Acting Corporation Counsel.

Validity of Provision Exempting Private Schools from Ventilation Requirement.

April 11, 1927.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.

Dear Sir:

In your communication of recent date addressed to the Corporation Counsel, relative to the amendment to Section 2153 of The Chicago Municipal Code of 1922, you state:

“The question has been raised whether, due to the addition to section 2153, namely, ‘except in buildings used for private schools,’ the entire section may be non-enforceable because of its discriminatory features.”

You then request an opinion as to the legality of the above mentioned section in its present form.

Section 2153 of the Code of 1922 was amended on March 9, 1927 (Council Proceedings, p. 5701), to read as follows:

“The air in any room used as an auditorium in buildings in classes IVb, IVc, IVd and V hereafter erected, and the air in any room used as a class room or assembly hall in buildings of Class VIII hereafter erected, *except in buildings used for private schools*, shall be changed so as to provide each person for whom seating accommodation is provided in such auditorium, class room or assembly hall with at least fifteen hundred cubic feet of air per hour.” (Amendment shown in italics.)

The foregoing ordinance limits the provisions thereof to buildings *hereafter erected*, i. e., any room used as an auditorium in buildings of Classes IVb, IVc, IVd and V; also class rooms and assembly halls in buildings of Class VIII—*hereafter erected*, except in buildings used for private schools. The exception does not purport to apply to existing buildings.

The law is well established that municipal ordinances must be general in their character, and operate equally on all persons within the municipality of the class to which they relate, and must not be in violation of law, contrary to public policy, or unnecessarily oppressive, since municipal corporations are mere creatures of the Legislature and can exercise no powers except those conferred upon them. *Zanone v. Mound City*, 103 Ill. 552; *Hibbard, Spencer, Bartlett & Co. v. City of Chicago*, 173 Ill. 91; *City of Chicago v. Brownell*, 146 Ill. 64; *City of Chicago v. Rumpff*, 45 Ill. 90; *City of Sullivan v. Cloe*, 277 Ill. 56.

A municipal ordinance of a regulatory nature in contravention of the natural rights of individuals, enacted under general charter powers, is not only required to be constitutional but must be reasonable as well, and the court before which it is brought must be able to see that it will tend to promote the public health, morals, safety or welfare and that the means adopted are adapted to that end and that it is impartial in operation and not unduly oppressive. *Elie v. Adams Exp. Co.*, 300 Ill. 340.

Private schools are defined as follows: "A private school is one managed and supported by individuals." (Vol. 35, *Cyclopedia of Law and Procedure*, p. 811.)

"The only difference between a public and a private school is the nature of the institution. One is a public institution, organized and maintained as one of the institutions of the State. The other is a private institution, organized and maintained by private individuals or corporations." (Citing cases.) (Vol. 24, *Ruling Case Law*, p. 558.)

Whether or not a school is public or private as above defined, does not necessarily affect the matter of necessary ventilation. We know of no standard or basis of computation on which can be figured a different volume of air for students in a private school as distinguished from a public school. If fifteen hundred cubic feet of air per hour is necessary for each person for whom seating accommodation is provided in

any auditorium, class room or assembly hall, we do not understand that such requirement would be reasonable when applied to public as distinguished from private institutions, or that the fact that such institution was either public or private would in any way determine the reasonable amount of ventilation required.

By reason of the foregoing I have serious doubts as to the legality of the foregoing ordinance as amended.

Respectfully submitted,

ROY S. GASKILL,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

Refund from Pension Fund to Fire Alarm Operators.

April 12, 1927.

RETIREMENT BOARD, MUNICIPAL EMPLOYEES' ANNUITY & BENEFIT FUND.

Gentlemen:

Replying to your request for an opinion as to the right of your Honorable Body to make a refund to beneficiaries of the Municipal Employees' Annuity and Benefit Fund who become promoted to the position of fire alarm operators, the following is submitted:

Your letter states that one Charles E. Shafer was a contributor to the Municipal Employees' Annuity and Benefit Fund while employed in the Department of Gas and Electricity; that he was promoted to the position of fire alarm operator and transferred to the Fire Department; that under Section 13 of the Firemen's Pension Act Mr. Shafer became a

member of the Fire Department and a contributor to the Firemen's Pension Fund arbitrarily; that moneys paid into your fund by contributors cannot be transferred to the Firemen's Pension Fund nor credited to the employees' account in said Firemen's Pension Fund; that Mr. Shafer was certified on January 12, 1912, in the Department of Gas and Electricity and promoted in the month of March, 1927. Section 39 of the Municipal Employees' Annuity and Benefit Fund Act provides as follows:

"Any municipal employee without regard to the period of time he shall have served, who shall resign or be discharged from the service * * * and before he shall become fifty-five years of age, * * * shall have a right to have refunded to him the entire amount which shall have accumulated to his credit for age and service annuity and widows annuity purpose on the date of such resignation or discharge from the service from amounts deducted from his salary in accordance with the provisions of this Act. Any such municipal employee who shall be a present employee shall have a right also to have refunded to him an amount equal to the total amount accumulated from any sums which were deducted from his salary, or otherwise paid by him in accordance with law and applied to any municipal pension fund * * * described in Section 52 or Section 52½ of this Act."

It is apparent that when this act was written, it was the intention that refunds should be made to those who had been contributors to this fund upon their ceasing to be beneficiaries of the fund. The involuntary transfer of a man from a department in which he was a beneficiary of this fund to another department in the service of the City which took him out of this fund, was not specifically provided for. Equity and justice would require, however, that the same privilege be accorded those taken involuntarily out of this fund as applies to those who withdraw from this fund voluntarily.

I am therefore of the opinion, under the circumstances of this case, that the transfer of a municipal employee out of a department of the City in which he was a contributor to and beneficiary of this fund into the Fire Department should be

construed as an involuntary resignation from his former departmental service on the part of the party so transferred, and that he should have refunded to him his contributions made into this fund with the same force and effect as though he had voluntarily resigned from such department and had voluntarily ceased to be a contributor to and beneficiary of this fund.

Very truly yours,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

Payee of Child's Annuity Where Majority Has Been Attained.

April 12, 1927.

RETIREMENT BOARD, POLICEMEN'S ANNUITY & BENEFIT FUND.

Gentlemen:

Replying to your request for an opinion as to the proper payee of a child's annuity, the following is submitted:

Your letter states that an application for annuity has been filed with you by Grace Vail, daughter of James Vail, a police sergeant, who died September 23, 1925; that Miss Vail at the time of her father's death was seventeen years and five months old; that there is no apparent reason why the applicant was not entitled to an annuity from the date of her father's death until her attainment of the age of eighteen years; that you are confronted with a question as to whether payment can be made directly to Miss Vail now that she has passed her eighteenth birthday.

Section 44 of the Policemen's Annuity and Benefit Fund Act contains the following provision:

"Any annuity which shall be granted for the benefit of any child shall be paid to the parent of such child who shall be providing for such child, unless another person shall have been or shall be appointed by a court of law as the guardian of such child."

The purpose and intent of the child's annuity is to aid in the support and maintenance of such child until such child attains the age of eighteen years. The law does not provide for the payment of a child's annuity to the child itself, but speaks of it as being an annuity "granted and paid for the benefit of any unmarried child less than eighteen years of age," etc.

I am informed that the mother of Grace Vail is dead, and as the amount of annuity to which Grace Vail would have been entitled was only seven months, or \$70, it would have been an unnecessary hardship to have required the appointment of a guardian with its attendant trouble and expense for this small amount.

Under all the circumstances as presented to me, I am of the opinion that your Honorable Body would be warranted in paying the \$70 annuity direct to Miss Vail, taking her release of any and all claims against the fund in consideration of such payment.

Very truly yours,

GEORGE F. MULLIGAN,

Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,

Acting Corporation Counsel.

Right of Watchmen to Carry Revolvers.

April 13, 1927.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

In reply to your communication addressed to the Corporation Counsel, requesting an opinion "as to the right of watchmen employed by the Builder's Protective Association to carry revolvers while on duty," I respectfully submit the following:

The letter of April 8, 1927, addressed to you from said Association states that said Association is incorporated under the laws of Illinois "for the protection of life and property" and employs several men whose duty is to travel from building to building during the hours between four-thirty p. m. and eight a. m. * * * ." Said letter also states:

These men are armed with revolvers for their own protection and as a means to aid them should they find thieves in or about the various buildings under construction which it is their duty to protect. Time and again your policemen have threatened to take them into custody for carrying concealed weapons. * * * ."

Questions relative to the right to carry concealed weapons have received the attention of this department on several occasions. See opinion of Corporation Counsel, dated April 15, 1890 (Opinions of 1872-1897, p. 151), as to right of City to license the carrying of concealed weapons; also opinion of October 18, 1894, (*ibid.* p. 211) concerning the carrying of unloaded weapons; also opinion of June 16, 1916, concerning the right of special policemen, appointed by the superintendent of police," to carry arms on the public highways while on the wagons of the firm or individual on whose application they were sworn in. (Opinions of 1915-1916, p.

1030) ; also opinion of January 29, 1921, concerning the right of special police officers to carry revolvers when off the right-of-way of the railroad by which they were employed. (Opinions of 1920-1923, p. 159.)

In and by an act of the General Assembly, entitled, "An Act revising the law relating to deadly weapons," Laws of 1925, p. 339; Chapter 38 Callaghan's Illinois Statutes, Par. 141 (4) *et seq.*, it is provided:

"No person shall carry concealed on or about his person a pistol, revolver or other firearm. This provision does not apply, however, to the following officers while engaged in the discharge of their official duties: Sheriffs, coroners, constables, policemen or other duly constituted peace officers, and wardens, superintendents and keepers of prisons, penitentiaries, jails and other institutions for the detention of persons accused of crime; nor to the following employees or agents while engaged in the discharge of the duties of their employment: conductors, baggagemen, messengers, drivers, watchmen, special agents and policemen employed by railroads or express companies; nor to persons lawfully summoned by an officer to assist in making arrests or preserving the peace while so engaged in assisting such officer."

From the facts submitted it does not appear that the employees in question come within the foregoing provisions of the statute authorizing the carrying of firearms by the persons therein designated.

Respectfully submitted,

ROY S. GASKILL,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Acting Corporation Counsel.

Status of Newly Elected Alderman.

April 15, 1927.

HON. PATRICK SHERIDAN SMITH, City Clerk.

Dear Sir :

We are in receipt of your letter of the 14th inst. in which you ask two questions with reference to the status of the alderman of the 5th ward. Your first question is whom you should officially recognize as the sitting alderman at the present time. The second question is from what day shall you place Leonard J. Grossman on the payroll if it is decided that he is the alderman.

Your letter states that on April 6, 1927, there was filed in your office an election certificate of Leonard J. Grossman as alderman for the 5th ward, issued by Robert M. Sweitzer, County Clerk, under date of April 6, 1927; also that on the same date an oath of office subscribed by said Grossman and duly attested was filed with you. We take it from the information you have given in this letter that nothing else pertaining to this situation has been filed with you. Under these conditions there is nothing before you by which you can act except this record.

There is no specific time fixed by the statute for the inauguration of an alderman. Therefore, under the rule announced in the case of *People ex rel. Holdom v. Sweitzer*, 280 Ill. 436, the term begins as soon after the election of an alderman as he has duly qualified. The qualification is controlled by Section 4 of Article VI of the Cities and Villages Act, which prescribes that all officers before entering upon the duties of their respective offices shall take and subscribe the oath of office therein set forth. In the case of such officers as are required to give bond before they have duly qualified, they must submit their bonds and the same must

be approved by the City Council; but in the case of alderman, inasmuch as no bond is required, the taking and subscribing of the oath of office and the filing of it in your office is the final qualification, and the alderman takes office as of that day. Consequently, the alderman in question should be placed on the payroll as of April 6, 1927.

We assume your question with regard to whom you should officially recognize is prompted by some information that you may have concerning court proceedings that are pending. There is nothing officially before you concerning these proceedings, and therefore we do not deem it proper to discuss them, nor will it be proper for you to take notice of them until you have been served with due process in regard to them. Therefore, it is incumbent on you to officially recognize as the sitting aldermen of the 5th ward Mr. Leonard J. Grossman, who qualified on April 6, 1927, as stated above.

Yours truly,

LEON HORNSTEIN,

First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Acting Corporation Counsel.

Signature of Clerk on Council Journal.

April 14, 1927.

HON. PATRICK SHERIDAN SMITH, City Clerk.

Dear Sir:

We have before us your letter of this date in which you inquire whether you or Mr. Al F. Gorman shall sign the original Journal of the Proceedings of the special meeting of the City Council held Tuesday, April 12, 1927, at two o'clock p. m.

You are now the duly qualified City Clerk of the City of Chicago and are the only one who can properly present the Journal and record of the special meeting to the City Council for approval. Therefore, even though Mr. Gorman participated as clerk of that meeting and was officially such up to the time that your bond was approved by the City Council, nevertheless the duty of keeping the records and reporting them to the City Council now devolves on you, and you are the proper person to sign the same.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Acting Corporation Counsel.

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